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INVESTIGATION OF TITLES

Margaret Allison
TO 1870

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IN FEE SIMPLE,

BY

THOMAS WARDLAW TAYLOR, M.A.,

BARRISTER-AT-LAW, REFEREE OF TITLES, AUTHOR OF "CHANCERY STATUTES
AND ORDERS," AND LATE EXAMINER IN LAW,
UNIVERSITY OF TORONTO.

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PREFACE.

In the earlier days of this Province little attention was paid to conveyancing, or the investigation of titles. Purchasers of land appear to have been satisfied on receiving a deed from some person professing to be the owner, and getting it placed on registry; the past was not enquired into, and the future was left to take care of itself.

In later years the increased value of land has caused more attention to be paid to such matters, and it is now that the evil effects of the former careless mode of dealing with land are being felt. Many of the older titles are, when closely scrutinized, found to be in a state of confusion, and almost unmarketable. Every day which passes increases the extent of the evil, as the longer the delay in attempting the removal of the existing defects the greater difficulty is experienced in procuring the evidence necessary to remove them.

Towards remedying this state of things, the act for Quieting Titles, passed in 1865, is a great assistance. Under that Act an owner of land may, without waiting until his title is attacked, take active steps to have his title investigated and its validity declared. He can, by proceeding under the Act, compel the production of documents affecting his title, and the attendance of persons capable of giving evidence as to former owners and their possession and dealing with the property. When

he has made out his title satisfactorily he is entitled to a certificate of title, which is absolute and indefeasible against all the world, and which shuts out forever all question as to the past.

At the present day, when more attention is being paid to the examination of titles, many of the profession find themselves at a loss. From the loose system which has prevailed, and to which they have been accustomed, they are comparatively ignorant of the practice of conveyancers, and as to the evidence which they ought to require, and are entitled to call for when examining a title.

To aid such in acquiring a knowledge of conveyancers' evidence, and as a step towards the introduction of a better state of things, this little work is offered to the profession. In the first chapter some introductory remarks are made upon the duty of solicitors on examining a title, and attention is called to the various points which should receive their notice. The next chapter is devoted to registration, and the requirements of the registry acts. The third and fourth chapters are occupied with incumbrances and particular titles, such as possession, inheritance, &c. In the next two chapters the subjects of attested copies, covenants for production, secondary evidence, and presumptions, are shortly treated of, and the concluding chapter is devoted to a few remarks upon proceedings under the Act for Quieting Titles. By way of appendix, the Act itself, and the Consolidated Orders of the Court of Chancery relating to the subject are added, together with a few forms which may be of use to those who propose to avail themselves of the benefits of the Act.

It is not expected that this little work will supersede, or even rival, the more extended treatises of English writers upon the various subjects embraced in it, but if it shall prove in any degree an aid to some who are engaged in the arduous duties of their profession, the labour bestowed upon it will be amply rewarded.

OSGOODE HALL,

28th October, 1869.

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CHAPTER I.

INTRODUCTION.

THE safety of a purchaser requires that the title should be examined for him with the most scrupulous care by a person skilled in the laws relating to real property, and possessed of experience in the investigation of titles; and the solicitor employed should read and scrutinize every part of every document relating to the title he examines.

The evidence of the title, he is entitled and bound to demand, is always written; consisting either of original legal instruments, or of statements and proofs reduced to writing.¹

He is to remember that though his client may be a willing purchaser, yet, that when he or his heirs wish to sell or mortgage complete written evidence may be required of him, and if then obtainable at all, must be procured by his client at his own expense. All the evidence and not merely the deeds, should, therefore, be carefully preserved.

The possession of the property, and not merely the paper title, should be inquired into. This is a cardinal point, and yet is often neglected. If the possession has always gone with the title claimed by the vendor,

1. See on Abs. 1.

it affords a presumption in favour of the title ; and the deeds, &c., under which it is derived, may be assumed to be genuine (unless something suspicious appears on their face). If the possession has not always gone with the title, satisfactory evidence of the reason cannot safely be dispensed with.

If a certificate of title or chancery deed has been obtained under the Act for Quieting Titles,² the investigation has only to be from the date of such certificate or deed, the same being made by the Act,³ "conclusive at law and in equity;" and it is declared that "the title therein mentioned shall be deemed absolute and indefeasible, from the day of the date of the certificate, as regards Her Majesty and all persons whatever, subject only to any charges or incumbrances, exceptions or qualifications mentioned therein, or in the schedule thereto."

If no certificate or deed has ever been obtained under the Act, the investigation should go back to the Crown Grant.

In England, if a vendor shows a title for sixty years, accompanied by actual possession for that period, that is generally sufficient for a purchaser, but the reasons for this rule do not appear to apply to this country.

The Grant itself, or an exemplification or certified copy, should be read, and not merely the memorandum thereof in the Registry Office. It may be observed here that old Patents contained certain conditions which have since been dispensed with by the Public Land Act of 1860,⁴ which contains the following enactment—"With a view to remove doubts, and to quiet the titles to certain lands heretofore granted, it is enacted, that

2. 29 Vic. c. 25.

3. Sec. 30.

4. 23 Vic. c. 2, s. 84.

the non-observance and non-fulfilment of the condition imposed in and by certain patents issued for public lands, of taking the oaths which may have been heretofore prescribed, in case of any subsequent sale, conveyance, infeoffment or exchange, by the patentee, or of recording such oaths, within twelve months after having taken possession, in the office of the Secretary of the Province, or of performing certain settlement duties, shall not affect in any way the patent or title of any patentee, or of any subsequent purchaser or proprietor."

The title from the grantee of the Crown may depend on deeds, wills, inheritance, &c. ; and if a perfect title is in this way established, searches must be made as to crown debts, Sheriff's sales, executions, taxes, tax sales, and the Statutory liens of Mutual Insurance Companies, &c., before the title is accepted.

As to the deeds, if they come from the proper custody, and there is nothing suspicious about them, their due execution, according to their purport, may be assumed without proof.⁵

If they are in the possession of third persons, inquiries should be made of the holders, respecting the nature of their interest, care being taken to inform them of the pending contract of purchase.⁶

Similar inquiries should be made of tenants, and persons in possession ; and the leases they have should be inspected in order to ascertain whether there are any unusual terms by which the purchaser would be bound.⁷

If any of the deeds are not produced, the vendor must give satisfactory evidence of their loss and contents.

5. *Cov. Con. Ev.* 18, 19, 41.

6. *Ibid.* 6 ; and see *Moffatt v. Bank of Upper Canada*, 5 Grant, 374.

7. 1 Byth, *Con.* 101.

The loss of any of the title deeds, whether old or recent, is not necessarily fatal to the title,⁸ but in this country, where copies of deeds were seldom made or kept before it became necessary to register deeds in full, and where abstracts, in the proper sense of that term in conveyancing, are seldom made, the loss of a deed may be fatal as between vendor and vendee.

In Lord St. Leonard's work on Vendors and Purchasers,⁹ he says,—“The loss of the deeds may not be fatal to the title if the vendor can deliver over copies which would be evidence at law. But if the title deeds are lost, the seller must furnish the purchaser with the means of showing what were the contents of the deeds, and of proving that they were duly executed.”

The course taken by the Master of the Rolls in *Bryant v. Busk*¹ seems to imply that he considered an abstract prepared from the deed might afford sufficient knowledge of the contents of the missing deed; but it is very doubtful whether in the case of deeds not sixty years old anything short of a copy, or an abstract (in the proper sense of the word as used by English Conveyancers) will do, unless the purchaser chooses to be satisfied with less evidence.²

To let in evidence of a copy, or other secondary evidence of a deed, strict proof of the loss, or destruction of the deed is an essential preliminary. An affidavit of the vendor himself is not sufficient for this purpose.³ The evidence must be at least such as would be necessary to let in secondary evidence on a trial at law, or hearing in equity.⁴

As to the contents, it should be observed that the

8. *Moulton v. Edmonds*, 1 D. F. & J. 250.

9. Sug. V. & P. 437, 438.

1. 4 Russ. 1.

2. *Dart on Vendors*, 196, 199, 207; Sug. V. & P. 436, 438; *Lee on Abs.* 318.

3. Sug. V. & P. 437; *Stubbs v. Sargon*, 4 Beav. 90.

4. *Taylor on Evid.* see 398, *et seq*; *Leith's Real Prop. Stat.* 427.

memorial of a registered deed, unless it contains the deed verbatim, (which before the act of 1865,⁵ it very seldom did,) is not alone sufficient evidence of the contents, as the law required in memorials, only the date of the instrument, the names and additions of the parties to it, the names and additions of the witnesses, and their places of abode; the lands contained in it, and the City, Town, Township or place in the County or Riding, where the lands are situate in the manner in which the same are described in the instrument or to the like effect;⁶ and the deed may therefore have contained important particulars not noticed in the memorial, such as a proviso for redemption, a trust, various exceptions and qualifications, &c., &c.

The deeds being produced, the following are some of the points to be carefully observed in ordinary cases.

(1) Are the parcels correctly described in every deed?

(2) Are the operative words in each deed sufficient? Do they profess to convey to the grantee and his heirs?

(3) Does the deed contain all the usual covenants, and no others? Do the covenants make any exception as to incumbrances or the like?

Anything unusual in the covenants, or the omission of usual covenants, calls for inquiry and consideration as to the cause of it.

(4) Is there a duly signed receipt for the purchase money, on the back or on the margin of every deed?

A distinct recital in a deed that the consideration money has been paid, is, as between grantor and third parties equivalent to an endorsed receipt,⁷ though the ordinary receipt in the body of the deed is not.

5. 29 Vic., c. 24.

6. Con. Stat. U. C., c. 89, s. 19.

7. 1 Ryth. Con. 90; 5 Ryth. Con. 26; and see *White v. Wakefield*, 7 Sim. 401.

A deed may be executed before payment of the purchase money, and the endorsed receipt is not supposed to be signed until the money is paid. In case therefore of deeds executed before the 18th September, 1865, if the consideration has not been paid, the absence of a recital of payment, or of an indorsed receipt is deemed constructive notice of the non-payment to future purchasers;⁸ and the grantor may have a lien on the property for the amount due to him. But in regard to deeds executed since 18th September, 1865, and registered, unpaid purchase money is no lien.⁹

In the absence of such a receipt, payment of the purchase money may be presumed after forty years,¹ if possession has gone with the deed, but should be proved by other means, if less than forty years have expired. The lapse of twenty years is not necessarily sufficient, because there may have been an acknowledgment or the like within that period; and if an acknowledgment should subsequently appear, a future purchaser is bound by it. The vendor should therefore be required to get an acknowledgment from the grantor, or sufficient other evidence, from which, in connection with the lapse of time, the payment may safely be assumed.

(5) Does each deed purport to be duly executed by the grantor personally, or by attorney? If by attorney, the power of attorney must be produced and examined.

If executed prior to the passing of the 29 Vic., cap. 28, (18th September, 1865), evidence is necessary that the author of the power was living at the time the deed was executed.

The evidence may be dispensed with in two cases; (1) If the power of attorney is thirty years old, and possession of the property has gone according to the

8. *Lee on Abs.*, 418, 471; *Baldwin v. Dulgnan*, 6 Grant, 595.

9. 29 Vic., c. 24, s. 66; Ont. Stat. 31 Vic., c. 20, s. 68.

1. *Dart on Vendors*, 216.

deed for that period, the presumption may be made, without further evidence, that the appointor was living when the deed was executed² (2) If the power of attorney was executed after the 18th September, 1865, its terms should be considered with reference to the 23rd section of the Property and Trusts Act;³ which enacts that in case a power of attorney "provides that the same may be exercised in the name and on the behalf of the heirs or devisees, executors or administrators of the person executing the same, or provides by any form of words that the same shall not be revoked by the death of the person executing the same, such provision shall be valid and effectual to all intents and purposes, both at law and in equity, according to the tenor and effect thereof."

The power may also be well exercised notwithstanding the appointor's death, if the party had no notice of the death when the deed was executed and the transaction completed;⁴ but a purchaser is not bound to accept a title depending upon a former owner's appearing to have had no notice of what would otherwise invalidate the title.

(6) Has the wife of every former owner duly barred her dower?

Prior to the 11th of May, 1839, it was necessary⁵ to render a bar of dower by the grantor's wife effectual, that she should be examined touching her consent to bar her dower, and that a certificate of such examination should be endorsed upon the deed.

Since the 11th May, 1839, a wife joining with her husband in a deed or conveyance containing a release of dower is sufficient without any examination or ac-

2. Cov. Con. Ev. 37.

3. 29 Vic., c. 23.

4. Ibid., sec. 24.

5. 37 Geo. 3, c. 7; 48 Geo. 3, c. 7; 50 Geo. 3, c. 10.

knowledge⁶. But when a woman bars her dower by a deed to which her husband is not a party, it is still necessary for her to be examined, and to have a certificate of the examination endorsed on the deed.⁷

If there is any deed in which the grantor's wife does not join, evidence should be obtained that the grantor was unmarried at the time, or that his wife is since dead, or that for some reason she is not entitled to dower.⁸

Where one of the grantors in any deed is a married woman, care must be taken to see that a proper certificate of her having executed the deed, and of her examination before a Judge or two Justices of the Peace is endorsed, that it is correct in form, and shews that the examination was taken on the day of the execution of the deed.⁹ If the deed is executed in Great Britain or Ireland, or in any colony belonging to the Crown of Great Britain other than Upper Canada, the execution of the deed must be in the presence of, and the examination taken before the Mayor or Chief Magistrate of a City, Borough or Town Corporate in Great Britain and Ireland, or the Chief Justice or Judge of the Supreme Court of the Colony;¹ if executed in a foreign country, then before the governor or chief executive officer of the state or country, or in presence of a British Consul, or of a Judge of a Court of Record of such state or country.²

By the statute³ all deeds executed by a married woman before the 21st day of May, 1859, are declared valid, although the certificate of execution and examina-

6. 2 Vlc., c. 6, s. 3; Con. Stat. U. C. c. 84, s. 4; and see *Heward v. Scott*, 2 Chan. Cham. R. 274.

7. Con. Stat. U. C. c. 84, ss. 6, 7, 8, 9.

8. *Dyke v. Rendall*, 2 D. M. & G. 209; *Thompson v. Watts*, 2 J. & H. 291.

9. Con. Stat. U. C. c. 85, s. 2.

1. *Ibid*, s. 3.

2. *Ibid*, s. 4.

3. *Ibid*, ss. 11, 12, 13.

tion was given on a day subsequent to the day on which the deed was executed ; or the certificate is of the woman's consent to be barred of her dower, instead of her consent to convey ; or although the certificate is not in strict conformity with the forms prescribed by the act ; subject however, to a proviso,⁴ that this should not render valid any conveyance from a married woman, which was not executed in good faith, nor prejudice any title which had been acquired from the married woman, subsequent to the defective conveyance.

When the deed is executed by more than one married woman, the examination and names of all or any number of them may now be included in one certificate.⁵

It is necessary that the husband should join in the deed, and his merely signing and sealing is not sufficient, he must be named as a party to it.⁶

(7) Have all mortgages been duly discharged ?

The fact that a mortgage previously existing appears to have been discharged by a certificate under the statute, does not relieve the purchaser's solicitor from the responsibility of examining the certificate of discharge.

The statute⁷ giving such a certificate the effect of a reconveyance, rendered it imperative, that it should be in the form prescribed by the act, and duly proved by the oath of a subscribing witness. The form given in the act showed that two witnesses were necessary to its due execution, and the Registry Act of 1865,⁸ expressly required two witnesses, but the subsequent act of 1867,⁹ declares that one witness shall be sufficient.

4. Ibid, s. 14.

5. Ont. Stat. 32 Vic. c. 9, s. 2.

6. Doe d. Bradt v. Hodgkins, 2 U. C. Jur. 213 ; Foster v. Beal, 15 Grant, 244.

7. 9 Vic. c. 34, s. 23 ; Con. Stat. U. C. c. 89, s. 57.

8. 29 Vic. c. 24, s. 58.

9. Ont. Stat. 31 Vic. c. 20, s. 60.

Since the 18th September, 1865, it is not imperative that the certificate shall follow exactly the form prescribed, the words "or to the like effect," being used.¹

The statute² further provided that upon such a certificate being presented to the Registrar of the county, he may write the word "discharged" and affix his name in the margin of the register, wherein the mortgage has been registered, and the same shall be deemed a discharge thereof; and such certificate shall be filed and numbered, and entered in the margin of the register, under the word discharged.

By the Registry Acts of 1865,³ and 1867,⁴ the Registrar is to register the certificate at full length in its proper order, and number it like other instruments, and he is to make, in a prescribed form, and sign an entry in the margin of the register, wherein the mortgage is registered.

To make the certificate effectual as a reconveyance, it would appear that all these requirements must be strictly complied with, for the words of the Statute are, "such certificate so registered shall be as valid and effectual in law as a release of such mortgage, and as a conveyance to the mortgagor, his heirs, executors, administrators or assigns, or any person lawfully claiming by through or under him or them, of the original estate of the mortgagor."⁵

Although the executor or administrator of a deceased mortgagee may discharge a mortgage under the statute, which will have the effect of a reconveyance, he cannot sell or assign the legal estate in the land.⁶

1. 29 Vic. c. 24, s. 58; Ont. Stat. 31 Vic. c. 20, s. 60.

2. Con. Stat. U. C. c. 89, s. 58.

3. 29 Vic. c. 24, s. 53.

4. Ont. Stat. 31 Vic. c. 20, s. 60.

5. Con. Stat. U. C. c. 89, s. 59; 29 Vic. c. 24, s. 58; Ont. Stat. 31 Vic. c. 20, s. 60.

6. Robinson v. Byers, 9 Grant 572.

A discharge executed by one of several executors is not a valid discharge, all should join.⁷ A foreign administrator cannot give an effectual discharge, to do so he must first take out letters of administration in this Province.⁸

In the examination of the various documents produced as evidence of a title, the most scrupulous care is requisite on the part of the purchaser's solicitor. The remarks of Mr. Dart in his work on vendors, as to the duty of a solicitor in examining the abstract with the deeds are well deserving of attention. He says:—"The object of the examination is to ascertain, 1st, that what has been abstracted is correctly abstracted; 2ndly, that what is omitted is clearly immaterial; 3rdly, that the documents are perfect as respects execution, attestation, indorsed receipts, registration, stamps, &c.; and 4thly, that there are no indorsed notices, nor any circumstances attending the mode of execution, attestation, &c., &c., calculated to excite suspicion. Anything out of the ordinary course—such as the unusual position of the indorsed receipt—should be made the subject of inquiry. Every part of every document ought to be read through; notice of an incumbrance is equally notice whether contained in one or another part of a deed; and if an important point be overlooked, the purchaser, after the conveyance is executed and the purchase money is paid, will have no remedy against the vendor unless it falls within the covenants for title; and this apparently, although the abstract may have been incorrect; perhaps few of the most important duties of a solicitor are so frequently performed in a perfunctory manner."⁹

The case of *Kennedy v. Green*,¹ is an important case

7. *MacPhadden v. Bacon*, 13 Grant, 591.

8. *Re Thorpe*, 15 Grant, 76.

9. *Dart on Vendors*, 273.

1. 8 M. & K. 699.

on the subject of suspicious circumstances amounting to notice ; and there it was held that, "whatever is notice enough to excite attention, and put the party on his guard, and call for enquiry, is also notice of everything to which it is afterwards found that such enquiry might have led, although all was unknown for want of the investigation."

In that case, the Lord Chancellor said :—"The contents of the instrument itself were perhaps calculated to rouse suspicion, and prompt enquiry. But the back of the deed was checkered all over with suspicious appearances. The title of the deed, not in the engrossing hand, but written in a somewhat slovenly way, and with the words of the title of different sizes, beget a suspicion of hurry and imperfection in the preparation of the instrument. When does a stationer ever send such a blank indenture out of his office, unless when pressed for singular dispatch. Then the receipt written across one fold into a second square sideways, and the signature in the like manner running into the second square. But, above all, the receipt removed far from the top, and leaving such a space as might by the holder of the deed, supposing that space to have been left in blank, have been filled up in any manner he chose. This was at once a circumstance to excite the greatest, the most jealous suspicion, * * * * every unusual circumstance is a ground of suspicion, and prescribes enquiry ; and I hold the receipt written here in a way to enable any person to commit a gross fraud—a way for that reason never adopted—was abundant grounds for suspicion, and demanded inquiry and explanation. When to this we add the further unusual circumstance of the party's name being written on the square below, and with a fold between it and the receipt, so that it was most probably written when the receipt was folded down, assuredly no one can hesitate in pronouncing that who-

ever, especially a man of business, looked at the deed, must have conceived such suspicions as to call for inquiry."

In considering the evidence adduced in support of any title, the practice of good conveyancers is more strict than that of courts of justice, in weighing the sufficiency of evidence; but in determining its admissibility more lax.² That they should be more strict in weighing the sufficiency of evidence seems to be an effect of the difference in the position of the parties; that they determine with less strictness as to its admissibility seems to result from the difference in the powers and functions of those by whom the evidence is to be judged.

The rule applies generally to presumptions of fact, which conveyancers are slower in raising than Courts of Justice. Thus a seven years' absence without tidings, though it prevails as evidence of death in ejectment, is clearly insufficient as between vendor and purchaser.³

Besides the greater difficulty of retracing an erroneous step, there exists another cause of difference from forensic practice, in the more extensive office of conveyancer's evidence, which is to afford reasonable satisfaction to the purchaser that the title is good against all the world, and not merely like that of evidence in litigation, that it is sufficient to prevail against certain contending parties.⁴

Again, conveyancer's evidence is necessarily for the most part *exparte*. A vendor may therefore be required to furnish evidence which would be elicited by adverse proceedings, to prove or disprove facts which, if he were a party litigant, it would be the business of his opponent to negative or establish.

It may be laid down as a general rule, that a pur-

² Hubback on Suc, 63.

³ Dart on Vendors, 223.

⁴ Hubback on Suc, 63.

chaser can in strictness, require evidence of all facts material to the title from the date at which its regular deductive commences, whether such facts are to be used as positive or negative proofs; that is, proof of all facts whose existence must be either proved or assumed in order to establish affirmatively the vendor's title, *e. g.* the heirship of a vendor who claims by descent, and of all facts whose existence must be either proved or assumed, in order to establish such title merely by displacing the known or presumptive title of others; as the failure, determination, or release of some prior estate or incumbrance, whose existence is either known or may be presumed, as between vendor and purchaser. So also he may require a satisfactory explanation of matters which tend to impeach the validity of the abstracted instruments.⁵ But a purchaser cannot compel the vendor to procure evidence for the purpose of negating mere possibilities, although he may require him to answer, to the best of his knowledge, any relevant questions on the subject, and to furnish all evidence in his possession or power.⁶

5. Dart on Vendors, 219.

6. *Ibid*, 219.

CHAPTER II.

REGISTRATION.

THE deeds having been produced and examined, searches must be made in the County Registry Office, to see that the various requirements of the Registry laws have been complied with.

The certificate of the Registrar, or his Deputy, endorsed upon a deed, is *prima facie* evidence of registration.⁷

Such a certificate is, however, only *prima facie* evidence, and does not prevent a party from showing that there was no actual registry of the deed, or that the registration is void for non-compliance with the formalities required by the statute.

In *Doe d. McLean v. Manahan*,⁸ the late C. J. Robinson speaking of the 35th Geo. 2, c. 5, said, the statute, "makes such certificate *prima facie* evidence only of the registry with a view merely to sufficiency and facility of proof in the first instance; but such certificate is not to be taken as incontrovertible evidence of the fact so as to exclude all proof of the contrary. If it were to be taken as incontrovertible evidence then all people would hold their estates at the mercy of a Registrar, who could give affect to deeds at his pleasure by giving false certificates of registry never made." And Hagerman J. said, the certificate of registry "may be rebutted by evidence of facts showing it to be fraudulent and void."

⁷ 35 Geo. 3, c. 5, s. 13; 9 Vic. c. 34, s. 9; Con. Stat. U. C. c. 80, s. 80; 29 Vic. c. 24, s. 81; Ont. Stat. 31 Vic. c. 20, s. 53.

⁸ 1 Q. B. U. C. 493.

In *Robson v. Waddell*,¹ Draper C. J. said, "it might be argued that a memorial of this prior deed was in fact entered in the registry book, and that the registration of the deed was certified on the back thereof by the Registrar, and that both these acts were completed before the execution of the subsequent mortgage, but the answer is, that such a memorial as by the act is directed has never been entered, and therefore the certificate of the Registrar wants the necessary foundation, and though the statute makes the certificate of the Registrar evidence of registration in all Courts of Record, it is not made conclusive, so that parties interested cannot go behind it and shew that the statute has not been complied with."

The importance of searching the registry office carefully, and seeing that the requirements of the act have been complied with, will be apparent, when it is remembered that defective registration is not notice.²

It is true that by the recent Registry Acts, many defects in past registrations, which might otherwise have been raised as objections, are cured; the statute³ declaring, that "no registration of any deed or instrument heretofore made shall be deemed or adjudged void by reason of the name or names, residence or residences, addition or additions, of the witness or witnesses to such deed or instrument being improperly given or described in the registered memorial thereof, or being in part or altogether omitted from such memorial, or by reason of any clerical error or omission of a formal or technical character therein."

In every case however, where the registration of deeds prior to these acts is found to be defective, it will

1. 24 Q. B. U. C. 58.

2. *Boucher v. Smith*, 9 Grant, 347; *Reed v. Whitehead*, 10 Grant, 446.

3. 29 Vic., c. 26, s. 78; Ont. Stat. 31 Vic., c. 20, s. 80.

still require consideration whether the defect is of such a formal or technical character as to be cured by the foregoing enactments.

The first Registry Act⁴ was passed at an early period in the history of the Province. The object of the Legislature in establishing a system of registration, was to enable any one dealing with property from time to time, to know whether it was affected by any existing deed or conveyance, and to compel the registration of so much of such deed or conveyance as would afford this knowledge, on the penalty in default thereof of its being held void.⁵

By the original Act⁶ registration was not made imperative; but it was enacted,—“That from and after the confirmation of all or any lands to any person or persons by grant from the Crown, under the seal of the Province, a memorial of all deeds and conveyances which shall be made and executed and of all wills and devises in writing made, or to be made, and published when the devisor or testator shall die, after making and publishing of the same, of or concerning, and whereby any lands, tenements or hereditaments in any County or Riding of this Province may be anywise affected in law or equity, may, at the election of the party or parties concerned, be registered; and that every deed and conveyance that shall at any time after any memorial is so registered, be made and executed of the lands, tenements or hereditaments, or any part thereof, comprised or contained in any such memorial, shall be adjudged fraudulent and void as against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial be registered as by this act is

4. 36 Geo. 3, c. 5.

5. *Reed v. Whitehead*, 10 Grant, 452.

6. 36 Geo. 3, c. 5, s. 2.

directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim, and that every devise by will of the lands, tenements or hereditaments, or any part thereof, mentioned or contained in any memorial as aforesaid, that shall be made and published after the registering of such memorial, shall be adjudged fraudulent and void against a subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such will be registered in such manner as hereinafter directed."

By an Act⁷ passed two years later, after reciting that lands had been intended to be conveyed by deeds of bargain and sale, and that such deeds not having been enrolled in any Court of Record were invalid, it was enacted,—“That wherever any lands have been sold, or shall hereafter be sold under deed of bargain and sale, and such deed of bargain and sale hath been, or shall hereafter be duly enregistered in the Registry Office of the County in which such lands are situate, agreeably to the provisions of the Act 35 Geo. 3, c. 5, the same shall be, and is hereby declared to be, a good and valid conveyance in law.”

Subsequently, it was enacted by the 4 Wm. 4, c. 1,⁸ “That after the passing of this Act a deed of bargain and sale in this Province shall not be held to require enrollment or to require registration to supply the place of enrollment for the mere purpose of rendering such bargain and sale a valid and effectual conveyance for passing the land thereby intended to be bargained and sold, provided always that the necessity of registering any such deed of bargain and sale in the registry of the County in which the land is situated, in order to

7. 37 Geo. 3, c. 8.

8. Sec. 47.

guard against a subsequent purchaser of the same lands, obtaining title by prior registry shall continue as before the passing of this Act."

In 1846, all the then existing statutes as to registration were repealed, and an Act⁹ passed, consolidating and amending the Registry laws.

By that Act,¹ the 2nd section of the 35 Geo. 3, c. 5, was re-enacted *in totidem verbis*; and it was further provided,² that wills or the probate thereof, should be recorded within the space of twelve months after the death of the testator, and it was declared that such registration "shall be as valid and effectual against subsequent purchasers, as if the same had been recorded immediately after the death of such respective deviser, testator or testatrix; any thing herein contained to the contrary thereof in anywise notwithstanding: provided always, that in case the devisee or person or persons interested in the lands, tenements or hereditaments, devised in any such will as aforesaid, by reason of the contesting such will, or by any other inevitable difficulty, without his, her or their wilful neglect or default, shall be disabled from the recording the same within the respective times hereinbefore limited, then and in such case the recording the same within the space of twelve months next after his, her or their attainment of such will or probate thereof, or the removal of the impediment aforesaid, shall be a sufficient recording within the meaning of this Act; anything herein contained to the contrary hereof notwithstanding."

A further alteration and amendment of the Registry Law took place in 1850, and in the Act³ then passed, the option given as to registering deeds was taken

9. 9 Vic. c. 34.

1. Sec. 6.

2. Sec. 12.

3. 13 & 14 Vic. c. 63.

away, and it was enacted,⁴—"That after any grant from the Crown of any lands in Upper Canada, and deed patent thereof issued, every deed, devise or other conveyance which shall be executed at any time after the first day of January, 1851, whereby any lands, tenements or hereditaments in Upper Canada may be in any wise affected in Law or Equity, shall be adjudged fraudulent and void, not only against any subsequent purchaser or mortgagee for valuable consideration, but also against a subsequent judgment creditor who shall have registered a certificate of his judgment, unless such memorial be registered as by the said first recited Act,⁵ is specified before the registering of the memorial of the deed, devise or conveyance, or the certificate of the judgment under which such subsequent purchaser, mortgagee or judgment creditor respectively shall claim, subject, nevertheless, as to devisees, to the provisions contained in the 12th section thereof; provided always, that nothing herein contained shall be construed to affect the right of equitable mortgagees as now recognized by the Court of Chancery in this Province."

By the next section,⁶ after reciting that the doctrine of tacking had been found productive of injustice, and required correction, it was enacted, that deeds should take priority according to registration, and if not registered, according to the time of execution. And by the 8th section, it was provided,—“that the registry of any deed, conveyance, will or judgment under the first recited Act,⁷ or this Act, affecting any lands or tenements, shall in equity constitute notice of such deed, conveyance, will or judgment, to all persons claiming any interest in such lands or tenements subsequent to such registry."

4. Sec. 3.

5. 9 Vic. c. 34.

6. Sec. 4.

7. 9 Vic. c. 34.

The 16th Vic. c. 187, made provision,⁸ that whenever, after the passing of the Act, a deed should be executed under a power of attorney from the grantor, a memorial of the power might be registered in the same manner and upon the same evidence as the memorial of a deed.

In 1855, statutory provision was made⁹ for the registration of decrees of foreclosure, and other decrees in Chancery, affecting any title or interest in land, and it was also enacted, that the filing of a bill or taking any proceeding in the Court of Chancery in which any title or interest in land might be brought in question should not be deemed notice of such bill or proceeding, to any person not a party thereto, "unless¹ and until a certificate shall be given by the Registrar of the Court of Chancery, and registered in the Registry Office of the County or Union of Counties in which the lands are situate, the title or interest in which is questioned in such bill or proceeding."

Upon the consolidation of the statutes taking place in 1859, the various enactments above referred to, from the 9th Vic. c. 34, were embodied in one Act,² with only a few slight verbal alterations, and the law as to registration continued in the same shape, except as to the registration of judgments, which was abolished in 1861,³ until the year 1865, when the 29 Vic. c. 24 was passed.

In the first Session of the Legislature of Ontario, an Act⁴ was passed, "respecting Registrars, Registry Offices, and the registration of Instruments affecting lands in the Province of Ontario," by the second section of which, all Acts inconsistent therewith were repealed.

8. Sec. 7.

9. 18 Vic. c. 127, s. 4.

1. Ibid, s. 8.

2. Con. Stat. U. C. c. 89.

3. 24 Vic. c. 41.

4. Ont. Stat. 31 Vic. c. 20.

The provisions of these two Acts, as to the mode of registration, and the effect of registering, or omitting to register, are exactly the same, and are as follows:—

“After⁵ any grant from the Crown of lands in Ontario, and Letters Patent issued therefor, every instrument affecting the lands or any part thereof comprised in such grant, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such instrument is registered in the manner herein directed before the registering of the instrument under which such subsequent purchaser or mortgagee may claim.”

“All⁶ wills, or the probates thereof, registered within the space of twelve months next after the death of the devisor, testator, or testatrix, shall be as valid and effectual against subsequent purchasers and mortgagees, as if the same had registered immediately after such death; and in case the devisee or person interested in the lands devised in any such will, is disabled from registering the same within the said time by reason of the contesting of such will or by any other inevitable difficulty without his or her wilful neglect or default, then the registration of the same within the space of twelve months next after his or her attainment of such will or probate thereof, or the removal of the impediment aforesaid, shall be a sufficient registration within the meaning of this Act.”

“The⁷ registry of any instrument, under this Act, or any former Act, shall in equity, constitute notice of such instrument, to all persons claiming any interest in such lands subsequent to such registry.”

“Priority⁸ of registration shall in all cases prevail, unless before such prior registration there shall have

5. 29 Vic. c. 24, s. 62; Ont. Stat. 31 Vic. c. 20, s. 64.

6. 29 Vic. c. 24, s. 63; Ont. Stat. 31 Vic. c. 20, s. 65.

7. 29 Vic. c. 24, s. 64; Ont. Stat. 31 Vic. c. 20, s. 66.

8. 29 Vic. c. 24, s. 65; Ont. Stat. 31 Vic. c. 20, s. 67.

(been actual notice of the prior instrument by the party claiming under the prior registration.”

“No⁹ equitable lien, charge, or interest, affecting land shall be deemed valid in any Court in this Province after this Act shall come into operation, or against a registered instrument executed by the same party, his heirs or assigns; and tacking shall not be allowed in any case to prevail against the provisions of this Act.”

Before patent from the Crown, the only instruments which can be registered in the County Registry Office, are those which create a mortgage lien or incumbrance upon the land.¹ The registration of these instruments is effected under the Consolidated Statutes of Upper Canada, c. 80, s. 24.

Since the 18th September, 1865,² grants from the Crown are registered by producing the original to the Registrar, and filing with him a true copy sworn to by any person who has compared it with the original. All other instruments except wills, are registered by the deposit of the original instrument, or by the deposit of a duplicate.

Wills³ are to be registered at full length by the production of the original will and the deposit of a copy, with an affidavit sworn to by one of the witnesses to the will proving the due execution thereof by the testator, or by production of probate, or letters of administration with the will annexed, under the seal of any Court in this Province, or in Great Britain or Ireland, or in any British Province, Colony or Possession, having jurisdiction therein; and by the deposit of a copy of such probate or letters of administration, with an affidavit verifying such copy.

9. 29 Vic. c. 24, s. 66; Ont. Stat. 31 Vic. c. 20, s. 68.

1. Holland v. Moore, 12 Grant, 296.

2. 29 Vic. c. 24, s. 35; Ont. Stat. 31 Vic. c. 20, s. 34.

3. 29 Vic. c. 24, s. 36; Ont. Stat. 31 Vic. c. 20, s. 35.

Prior to 1846, all that was required for registration was, that the memorial should be in writing, and in the case of deeds, under the hand and seal of the grantor, or of one of the grantors if more than one, or of some or one of the grantees, his or their heirs, executors or administrators, guardians or trustees, attested by two witnesses, one of whom was one of the witnesses to the execution of the deed, and who was required to prove upon his oath, the due execution of the deed or conveyance, and of the memorial.⁴ Wills were registered, upon production of a memorial, under the hand and seal of some or one of the devisees, his or their heirs, executors or administrators, guardians or trustees, attested by two witnesses, by one of whom the due execution of the memorial was proved upon oath.

The statute⁵ required the memorial to contain the day of the month and the year when such deed, conveyance or will bears date, and the names and additions of all the parties to such deed, conveyance or will, or the deviser or testatrix of such will, and of all the witnesses to such deed, will or conveyance, and the places of their abode, and to express or mention the lands, tenements or hereditaments contained in such deed, will or conveyance, and the names of all the Townships or Parishes within the said County or Counties, Riding or Ridings, where any such lands, tenements, hereditament or hereditaments are lying or being that are given, granted, conveyed, devised or any way affected or charged by any such deed, will or conveyance, in such manner as the same are expressed or mentioned in such deed, will or conveyance, or to the same effect.

By the 9 Vic. c. 34,⁶ a further requisite was introduced, viz: that the witness who proved the execution of the

4. 35 Geo. 3. c. 5. s. 4.

5. 35 Geo. 3. c. 5, s. 5; Con. Stat. U. C. c. 89, s. 19.

6. Con. Stat. U. C. c. 89, s. 23.

deed, conveyance or will, should also depose "to the place where the same was executed;" and this is still an essential requisite in the affidavit of the attesting witness.⁷

To a perfect registration it is essential, that all the requirements of the act should be complied with.

In *Robson v. Waddell*,⁸ the objection being taken, that in the memorial the addition of the witness to the deed was not given, though his name and place of abode were stated, Draper, C. J., in delivering the judgment of the Court said, "among the directions of the Act is one, that every memorial shall contain the names and additions of the witnesses to the deed and the places of their abode. It is enough to insert the names and additions of the parties to the deed, in the same manner or words as they are set forth therein; but with regard to the subscribing witnesses, their names and additions, and places of abode (though the two latter are rarely if ever in this country mentioned in the attestation) must be set forth in the memorial. The place of abode of a witness, when, as in the present case, his identity was established on his own oath at the trial, may be deemed unimportant; but it is one of the things which the statute requires, and the Courts neither can nor should endeavour to dispense with it, though in this particular instance, and even generally, they may think it of little value."

"We may think the objection to be strictly literal and technical, and may yet an omission such as has been made, which has not, and scarcely could under all the circumstances have operated to the prejudice of the subsequent mortgagee: that in fact it may have been rather to a search after objections, than for notice or information that the discovery of this defect is owing; but we cannot see in all this a sufficient reason for disregarding the lan-

7. 29 Vic. c. 24, s. 39; Ont. Stat. 31 Vic. c. 20, s. 33.

8. 24 Q. B. U. C. 574.

guage of the Act. Our judgment therefore must be founded upon the statute. We are bound to hold that this non-compliance with one of its express requirements makes the prior deed fraudulent and void as against the subsequent mortgagee."

In another case,⁹ where the objection was, that in the memorial the place of abode of the witness was given as, "of London," although the objection was overruled, the description being held a sufficient compliance with the Act, Esten, V. C., said, "It is undoubtedly essential that the requirements of the Registry Acts should be strictly observed, and any material failure in that respect will vitiate the registration."

The description of the parties as, "of the City of London," without adding "in the Province of Canada," was, in the same case, held sufficient.

To the affidavit of execution two objections seem to have been taken, the one, that the witness merely stated therein, that he had "seen the due execution of the deed;" the other, that the place of execution was not mentioned. With reference to these objections V. C. Esten said, "If the matter had been *res integra* I should be strongly disposed to think that it was not sufficient for the affidavit to state that the witness had "seen the due execution of the deed." I should have thought that it should describe the act performed, as in an ordinary affidavit of execution so as to enable the Registrar to judge of its sufficiency. But in this respect the affidavit follows the form prescribed by the Act of Parliament—it is probably a form commonly used—the affidavit is not the act of the party but of a witness, and it is a matter transacted between the witness and the Registrar, not intended for the information of the public, but for the satisfaction of the Registrar. It would be perhaps not

9. *Rold v. Whitehead*, 10 Grant, 448.

too much to hold that all the provisions respecting the proof are directory. The mention of the place of execution is, I think, intended to enable the Registrar to judge of the nature of the proof required in that particular case, and which is different according as the instrument is executed in, or out of Upper Canada. The Legislature have not thought it of sufficient importance to require it to be stated in the memorial, although it might afford some clue to the discovery of the instrument, or the detection of any fraud connected with it. I do not think that any defects in the affidavits in this case affect the validity of the registration to which they relate."

Where the deed was registered upon a memorial executed by the grantee, it was held necessary in order to valid registration, that one of the witnesses to the memorial, should also be one of the witnesses to the execution of the deed by the grantor.¹

It is no objection to the affidavit of execution, that it was taken by one of the subscribing witnesses before the other.² Whether an affidavit sworn before one of the parties to the instrument would, prior to the 18th September, 1865, be objectionable, is undetermined, but since that date it would, the statute³ saying, "none of the persons authorized to take affidavits by this act shall take any affidavit of the execution of any instrument in case he is a party to such instrument."

For the registration of a will, it is now essential, where the original will is produced to the Registrar, that the witness making the affidavit should swear to its execution by the testator;⁴ but prior to these statutes, proof of execution by the testator was required only in the case of wills executed out of Upper Canada.

1. *Jack d. Rennick v. Armstrong*, 1 Hud. & Brooke, 727.

2. *Reid v. Whitehead*, 10 Grant, 450.

3. 29 Vic. c. 24, s. 45; Ont. Stat. 31 Vic. c. 20, s. 44.

4. 29 Vic. c. 24, s. 36; Ont. Stat. 31 Vic. c. 20, s. 35.

As to the certainty of description of the land intended to be conveyed, in the case of *Reid v. Whitehead*, already quoted from, where it was objected that the description in the memorial did not sufficiently identify the premises, and the Court held that it did not, the Chancellor after quoting the section of the statute which declares what a memorial is to contain, said, "I take these words to mean that the description of the lands, as contained in the instrument, or such description as shall identify or make them known as fully as that description itself, shall be contained in the memorial."

"Now what are the facts here? The instrument sought to be registered purposes to assign a part of lot 10, in the City of London, as described in a certain indenture of mortgage thereto attached and which was not on the registry books. The memorial uses precisely the same words, but without showing what were the lands described in the deed referred to. The assignment and the deed taken together show the lands, and for this purpose they become incorporated and form one instrument, but the assignment by itself, or the memorial by itself, would not show what lands were assigned, or were affected by the deed assigned; and the memorial, therefore has not done its work. It does not mention the land contained in the instrument sought to be registered, for that instrument adopts and incorporates, by reference to another deed, where the description is to be found, and the memorial in order to describe the lands truly, should have gone to that instrument to which it referred, and taken from it the description, stating that it had been so taken," and the Court on this ground held the registration void.

On appeal, however, the decree of the Court of Chancery was reversed.^b

^a 2 E. & A. Rep. 582.

In delivering the judgment of the Court of Error and Appeal, Vankoughnet, C., said, "Three questions did not sufficiently engage attention there, (i. e. in the Court below). The first is, whether or not the assignment of the mortgage was in itself a conveyance capable of passing the interest which the mortgagee took under the mortgage in the land conveyed by it. I cannot say it was not. A reference in one deed to a description of land appearing in some other deed or paper, may be rendered sufficiently certain on the production of the latter. If this cannot be produced the grantee may be unable to make out his title, but this is a risk more or less common to all documents. A party desiring to deal with any portion of the land which may be affected by a description so given, must, I suppose, satisfy himself by inquiring what that description does cover, or he will run the risk of it; as on the other hand the owner of the land may find difficulty in disposing of his property when the description which he gives in a deed relating to a portion of it is not patent or easily ascertained. The second question is, whether the deed being operative, a registration of it by a memorial following the language of the deed is sufficient. I think we must say that it is."

Care should be taken to see that the affidavit of execution is sworn before a person qualified to administer the oath.

Before 1818, there seems to have been no provision for proving the execution of deeds executed out of Upper Canada. The Act⁶ provided only for proof of execution being made, by an oath before the Registrar, or his Deputy, or by affidavit sworn before one of the Judges of the Court of King's Bench, or before a Commissioner authorized to take affidavits in that Court.

An Act⁷ passed in 1818, provided for proof of the ex-

6. 35 Geo. 3, c. 5, ss. 4, 13.

7. 58 Geo. 3, c. 8.

execution of deeds in Great Britain or Ireland, or in any Colony belonging to the Crown of Great Britain, being given by affidavit sworn before the Mayor or Chief Magistrate of any City, Borough or Town Corporate in Great Britain or Ireland, or before the Chief Justice or Judge of the Supreme Court of any Colony. Another section⁸ of the same Act, allowed the execution of deeds to be proved before the Justices in Quarter Sessions assembled, in cases where the witnesses were dead.

The 9 Vic. c. 34, made further provision for the proof of deeds executed abroad, by affidavit, sworn in Lower Canada, before the Chief Justice or Judge of any Court of Queen's Bench, and before the Mayor of any City, Borough or Town Corporate in any foreign country, or before any Consul or Vice-Consul of Her Majesty, resident therein.

By the 12 Vic. c. 77, the Chief Justice and Judges of the Court of Queen's Bench were empowered to appoint Commissioners in Lower Canada for taking affidavits in any Court of Law of Record in Upper Canada, and the Act⁹ made affidavits of the execution of deeds sworn before such Commissioners, sufficient evidence upon which to register the memorial.

In addition to the persons specified above as qualified to take affidavits for registration purposes, affidavits of execution may now¹ be sworn, in Great Britain or Ireland, before a Judge of any of the Superior Courts of Law or Equity; or the Judge of any County Court; or before a Commissioner appointed for taking affidavits in the Canadian Courts;² or a Commissioner appointed by the Lord Chancellor to administer oaths in Chancery in England;³ or before a Notary Public, certified under his hand and official seal.⁴

8. Sec. 2.

9. Sec. 2.

1. 29 Vic. c. 24, s. 42; Ont. Stat. 31 Vic. c. 20, s. 41.

2. 26 Vic. c. 41, ss. 3, 5.

3. *Ibid.*

4. *Ibid.*

In Lower Canada, before a Judge, or Prothonotary of the Superior Court, or Clerk of the Circuit Court.⁵

If executed in any British Colony or possession the affidavit may now be also sworn, before any Judge of a Court of Record; or before any Notary Public; and in the British possessions in India, before any Magistrate or Collector, certified under the hand of the Governor to be such; and in foreign countries before any Judge of a Court of Record.

It would seem to be necessary, that the person before whom the affidavit is sworn, should add to his signature the addition, "Commissioner," or other designation, showing the character in which the affidavit was taken before him.⁶

Purchasers are now, however, protected from danger in consequence of many slips and errors which would, until recently, have vitiated the registration, by the provisions of the recent Registry Acts,⁷ that no past registration is to be void, "by reason of any clerical error or omission of a formal or technical character."

5. 29 Vic. c. 24, s. 42; Ont. Stat. 31 Vic. c. 20, s. 41.

6. Babcock v. Municipal Council of Bedford, 8 C. P. U. C. 527.

7. 29 Vic. c. 24, s. 78; Ont. Stat. 31 Vic. c. 20, s. 80.

CHAPTER III.

INCUMBRANCES.

1. *Mortgages, Vendors' Liens.*

If the purchaser is taking the land subject to any charges or liens which are not to be paid off out of the purchase money, inquiry should always be made of the persons appearing entitled thereto, as to their exact nature and amount; care being taken to inform them of the pending contract for purchase; for without such intimation the inquiry will be unavailing as against the persons claiming the charge or lien.⁸

A mortgage, although on its face made to secure payment of a specific amount, may be proved by parol evidence to be for a running account, and intended as a continuing security.

In *McMaster v. Anderson*,⁹ a mortgage having been given by Anderson to the plaintiff, for £125, payable at a certain time, the mortgagor afterwards sold the equity of redemption to Nigh, at the same time showing him a receipt in full for all indebtedness, signed by the plaintiff and dated subsequent to the mortgage. On a bill being filed for foreclosure after the mortgagor's death, V. C. Spragge admitted parol evidence to show that the mortgage, although given for a specific sum, was in fact intended as a continuing security for the mortgagor's indebtedness from time to time, not exceeding £125, and said, "I think that Nigh can stand in no better position than Anderson. It was his duty to have inquired of the mortgagee."

⁸ Cov. Con. Ev. 6; *Moffatt v. Bank of Upper Canada*, 5 Grant, 374.

⁹ M.S. 22nd May, 1865.

The lien which a vendor had prior to the recent Registry Act, for unpaid purchase money, bound the land for twenty years, though only six years arrears of interest could be recovered.

A purchaser without notice of the lien, who has got the legal estate, and registered his deed, can hold the land discharged from the lien; but if he had, before he paid his purchase money and obtained his conveyance, notice of the lien, the estate will be charged in his hands.

As a general rule, every suspicious circumstance which would put a cautious man upon his guard and suggest inquiry, will be deemed notice. If, therefore, there is any thing suspicious about any of the deeds, as for example, if, in the case of a deed executed before the 18th day of September, 1865, the endorsed receipt for the purchase money is wanting, or is unsigned, proof of payment of the purchase money should always be called for; the absence of such a receipt being constructive notice to a purchaser that the purchase money is unpaid.¹

It is clear the lapse of even twenty years is not sufficient to raise the presumption of payment, because there may have been an acknowledgment of the debt; and if an acknowledgment should subsequently appear, a future purchaser will be bound by it.² After forty years, however, if possession has gone with the deed, payment may be presumed.

In the case of deeds executed since the 18th September, 1865, unpaid purchase money forms no lien on the land.

The recent Registry Act providing that³ "no equitable lien, charge, or interest affecting land shall be deemed

1. *Baldwin v. Duignan*, 6 Grant, 595; *Lee on Abs.* 418, 471.

2. *Hall v. Ld. Riversdale*, Beat. 550; *Stanfield v. Hobson*, 16 Beav. 236; 3 D. M. & G. 620; *Rodham v. Morley*, 1 D. & G. 1; *Pendleton v. Booth*, 1 Gibb. 35; 1 D. F. & J. 81.

3. 29 Vic. c. 24, s. 66; Ont. Stat. 31 Vic. c. 20, s. 68.

valid in any Court in this Province, after this Act shall come into operation as against a registered instrument executed by the same party, his heirs or assigns."

This Act does not affect any liens created before the 18th of September, 1865.

In *McDonald v. McDonald*,⁴ it was contended that the Act was retrospective, and that a lien existing before the Act, was gone under the above section. In giving judgment, V. C. Mowat said, "It is difficult to believe, and I do not believe, that the Legislature meant to legislate away existing "liens, charges and interests." The language used is certainly large enough to comprise equitable interests existing before the passing of the Act, as well as those arising subsequently; but a like circumstance has been held in many cases to be by no means a decisive test of a meaning of a statute, words quite as broad as those in question have been construed as not retrospective. * * * I have examined most of the cases; and, reading the enactment in question in the light of these cases, and of the various clauses of the statute to which my attention was called, I am of opinion that the 66th section has not a retrospective operation."

2. *Crown Debts.*

Before the 15th of August, 1866, securities and engagements to the Crown, bound the real estate of the debtors and also of their sureties, from the time when the security to the Crown was given, or when the office or engagement in respect of which the debt was contracted was acquired or entered into,⁵ provided the requirements of the statute as to registration were complied with.

4. 14 Grant, 133.

5. Cov. Can. Ev. 234; Lee on Abs. 304.

By the statute,⁶ "no deed, bond, contract or other instrument, under seal or of record, whereby any debt, obligation or duty is incurred or created to Her Majesty, shall be valid or sufficient to charge or affect any lands or any interest in lands, of the person executing the same or affected thereby, as against any subsequent purchaser or mortgagee for valuable consideration of the same lands from such person, or against any subsequent registered judgment on the same lands against such person, unless a copy of such deed, bond, contract or other instrument, certified by the proper officer having the custody of the same had been registered in the office of the Clerk of the Court of Queen's Bench in Toronto, before the execution of the deed, conveyance or agreement of such subsequent purchaser or mortgagee, or the registry of such subsequent judgment."

The law has now, however, been altered, and in the case of bonds or other agreements entered into since the 15th August, 1866, "no⁷ bond, covenant, or other security, hereafter to be made or entered into by any person to Her Majesty, her heirs or successors, or to any person on behalf of or in trust for Her Majesty, her heirs or successors, shall bind the real or personal property of such person so making or entering into such bond, covenant or other security, to any further, other or greater extent than if such bond, covenant or other security had been made and entered into between subject and subject of Her Majesty."

"The⁸ real or personal property of any debtor to Her Majesty, her heirs or successors, or to any person in trust for or on behalf of Her Majesty, her heirs or successors, for any debt hereafter contracted, shall be bound only to the same extent, and in the same manner as the real or

6. Con. Stat. U. C. c. 5, s. 1.

7. 29 & 30 Vic. c. 43, s. 1.

8. Ibid, Sec. 2.

personal property of any debtor where a debt is due from a subject of her Majesty."

As this Act applies only to bonds or covenants executed since its passing, it is unsafe to deal with any person who before that became liable on a Crown bond, until he has procured and produced his quietus, discharging him from all liability to the Crown,⁹ or releasing the particular lands in question from the operation of the bond.

The statute¹ provides, that "The Governor in Council may order that all or any lands bound by such deed, bond, contract or other instrument, shall be released from the charge created thereby, and upon the production of such order certified by the President or Clerk of the Executive Council, the Clerk of the Court of Queen's Bench shall enter and register the same in the said book as a release of the lands mentioned in the order, whereupon the lands shall be released accordingly."

The search for Crown bonds should be made at the office of the Clerk of the Court of Queen's Bench at Toronto; but the Inspectors under the Act for Quieting Titles² have also an alphabetical list of all registered Crown bonds.

3. Executions.

Search must in every case be made in the office of the Sheriff of the County to ascertain whether there are in his hands any writs of execution against the lands of the vendor, and a certificate obtained that there are none.

To cover the contingency of writs returned by the Sheriff for renewal, the certificate should state not only

9. Cov. Con. Ev. 236.

1. Con. Stat. U. C. c. 5, s. 3.

2. 29 Vic. c. 25.

that there are no executions in his hands at its date, but that there have been none for thirty days previous.

The certificate should also state that there has been no sale of the lands under execution during the preceding six months.

Six months is a sufficiently long period to carry back the search, because the statute³ provides, that "all deeds of lands sold under process issued from any of the Courts of Law or Equity in Ontario, shall be registered within six months after the sale of such lands, otherwise the parties respectively claiming under any of such sales, shall not be deemed to have preserved their priority as against a purchaser in good faith who may have registered his deed prior to the registration of such deed from the Sheriff or other officer."

Before the passing of this Act, no time was limited within which a Sheriff's deed required to be registered; and such a deed, though unregistered, could not be defeated by any subsequent conveyance made by the party whose lands had been sold by the Sheriff.⁴

Now, however, purchasers are protected against the possibility of any unregistered deeds from Sheriffs being outstanding, as the same statute provides,⁵ that all deeds for lands sold "under process of Law, before the passing of this Act, shall be registered within one year after the passing of this Act, otherwise the parties respectively claiming under any such sales shall not be deemed to have preserved their priority as against a purchaser in good faith who may have acquired priority of registration."

4. *Taxes.*

A certificate from the Treasurer of the County as to

3. 29 Vic. c. 24, s. 56; Ont. Stat. 31 Vic. c. 20, s. 53.

4. *Burnham v Daly*, 11 Q. B. U. C. 211.

5. 29 Vic. c. 24, s. 57; Ont. Stat. 31 Vic. c. 20, s. 59.

arrears of taxes, or that there are none, should always be procured. The certificate should show on its face, that the statement of taxes in arrear for the preceding year has been returned to the County Treasurer by the Township Treasurer⁶. If it does not show this, then a certificate must be procured from the Township Treasurer also, in which it should be stated that the Collector's roll has been returned by that officer to the Treasurer.⁷ If the roll has not been returned, the Collector's receipt for the taxes of the past year will be sufficient; but the County Treasurer's certificate is required in every case, to show that there are no previous arrears.

A search must also be made to ascertain whether there has been any sale of the land for taxes during the preceding eighteen months. This period, over which the search must extend, is fixed, because the Registry Act⁸ provides that every deed made by a Sheriff or other officer, for arrears of taxes, must be registered within eighteen months after the sale, otherwise the parties respectively claiming under any such sale, shall not be deemed to have preserved their priority as against a purchaser in good faith who may have registered his deed prior to the registration of the deed from such Sheriff or other officer.

The Registry Act of 1865 contained⁹ an exactly similar provision; but until the passing of that Act, there was no limit to the time within which such a deed required to be registered.

Purchasers are now, however, protected against the risk of any unregistered deeds on sales for taxes, executed before the 18th September, 1865, as the Statute¹ contains the following provision, "all deeds for lands sold

6. 29 & 30 Vic. c. 53, s. 116.

7. Ibid, sec. 104.

8. Ont. Stat. 31 Vic. c. 20, s. 58.

9. 29 Vic. c. 24, s. 56.

1. 29 Vic. c. 24, s. 57; Ont. Stat. 31 Vic. c. 20, s. 59.

for taxes, or under process of law, before the passing of this Act, shall be registered within one year after the passing of this Act, otherwise the parties respectively claiming under any such sales shall not be deemed to have preserved their priority as against a purchaser in good faith who may have acquired priority of registration."

5. *Special Improvements.*

Enquiry must also be made whether the property is liable to any special rate for local improvements, such a rate being made by statute, a charge upon the property benefitted.

By the Consolidated Statute² of Upper Canada relating to Municipal Institutions, the Council of every city could pass by-laws³ for assessing and levying upon the real property to be immediately benefitted by the making, enlarging or prolonging of any sewer, or the opening, widening, prolonging or altering, macadamizing, grading, levelling, paving or planking of any street, lane or alley, public way or place, or of any sidewalk therein, a special rate sufficient to include a sinking fund, for the repayment of debentures, which such Councils were thereby authorized to issue in such cases respectively to provide funds for such improvements.

To the validity of such a by-law it was not essential, that it should be in accordance with the restrictions and provisions contained in the 223rd section of the Act, which regulated the formalities necessary in by-laws for contracting debts by borrowing money or otherwise, or for levying rates for payment of such debts on the rateable property of the municipality.

To the validity of such a by law it was, however,

2. Cap. 54.

3. Ibid, s 299, sub. sec. 2.

necessary,⁴ that it should name a day within the financial year in which it was passed when it was to take effect; the whole of the debt and the obligations to be issued therefor, were to be made payable in twenty years at furthest from the day on which the by-law took effect; also, that it should settle an equal special rate per annum in addition to all other rates to be levied in each year on the real property described therein, and rateable thereunder, for paying the debt and interest and it was necessary that the special rate should be sufficient to discharge the debt and interest when payable, irrespective of any future increase in the value of the real property, and also irrespective of any income from the temporary investment of the sinking fund or of any part thereof.

The by-law was also required to recite the amount of the debt created, and, in general terms, the object for which it was created, the total amount required to be raised annually by special rate for paying the debt and interest; the value of the whole of the real property rateable under the by-law as ascertained and finally determined; the annual special rate in the dollar, or per foot frontage, or otherwise, for paying the interest and creating the sinking fund; and that the debt was created on the security of the special rate settled by the by-law, and on that security only.

The Municipal Act of 1866⁵ contains exactly similar provisions to those above mentioned; and by the Act of the Legislature of Ontario amending the Municipal Institutions Act,⁶ the above provisions are extended to Towns also.

The rent which the Councils of Cities, Towns and

4. Ibid, s. 301.

5. 29 & 30 Vic. c. 51, ss. 301, 302, 303.

6. Ont. Stat. 31 Vic. c. 30, s. 35.

Incorporated Villages are entitled to charge in respect of property drained into a common sewer, or which by any by-law is required to be drained into any such sewer,⁷ does not form a tax upon the land, but a personal charge upon the owner;⁸ the authority given by the statute being "for charging all persons who own or occupy property which is drained, &c."

In Townships,⁹ on a petition of the majority in number of the resident owners of the property in any part of the Township, for the draining of the property being presented, the Municipal Council could, under the Consolidated Statute, if of opinion that the draining of the locality described would greatly benefit the Township, pass a by-law,¹ providing for the draining of the locality; for assessing and collecting from the proprietors of the several lands immediately benefited by the draining, so much of the cost thereof, and of procuring the examination plans and estimates to be made, and of all other expenses incident to the works, as may not exceed the benefit which the lands respectively derive from such draining, and in proportion, as nearly as may be, to the benefit of each of the proprietors therefrom.

The amount so to be assessed or collected would appear to form a charge upon the land, because the Council are further empowered² to provide by the by-law "for ascertaining and determining, through the Engineer, what real property will be immediately benefited by the draining, and the proportions in which the assessment should be made on the various portions of the land so benefited."

By the Municipal Act of 1866,³ the powers of Town-

7. Con. Stat U. C. c. 54, s. 297, sub. sec. 20; 29 & 30 Vic. c. 51, s. 290, sub. sec. 50.

8. Moore v. Hynes, 22 Q. B. U. C. 107.

9. Con. Stat. U. C. c. 54, s. 278.

1. Ibid, 279.

2. Ibid, sub. sec. 4.

3. 29 & 30 Vic. c. 51, ss. 281, 282.

ship Councils are extended to passing by-laws, for, among other things, "the deepening of any stream, creek or water course, or for draining of the property."

There is no doubt that under the provisions of the latter statute, the assessment for any of the above purposes will form a charge upon the property; the Council being given the power⁴ to provide by the by-law, "for assessing and levying upon the real property to be immediately benefited by the deepening or draining, a special rate sufficient to include a sinking fund, for the repayment of debentures which such Councils are hereby authorized to issue in such cases respectively, to provide funds for such improvements, and for so assessing and levying the same, by an annual rate in the dollar on the real property so benefited, in proportion, as nearly as may be, to the benefit derived by such portion."

The rate so assessed is to be levied "in the same manner as taxes are levied."⁵

The Councils of Cities, Towns and Incorporated Villages may also pass by-laws⁶ for sweeping, watering or lighting any street, square, alley or lane, by means of a special rate upon the rateable property therein.

The assessment under any by-law of the Council of a Town or Incorporated Village, for making or repairing any pavement in any public way or place near to any property, would appear, under the decision of the Court of Queen's Bench in *Moore v. Hynes*,⁷ not to form a charge upon the property; the power given to the Council in such a matter being, for assessing or collecting from the proprietors, &c., such sums as may be necessary.

4. 29 & 30 Vic. c. 51, s. 282.

5. Ont. Stat. 31 Vic. c. 30, s. 30.

6. 29 & 30 Vic. c. 51, s. 34^o, sub. sec. 2.

7. 22 Q. B. U. C. 107.

County Councils⁸ may pass by-laws for levying by assessment on all the rateable property within any particular part of two Townships, to be described by metes and bounds in the by-law, in addition to all other rates, a sum sufficient to defray the expenses of making, repairing or improving any road, bridge or other public work, lying between such parts of such two Townships, and by which the inhabitants of such parts will be more especially benefited.

6. *Mutual Insurance Companies.*

It is important to ascertain, whether the vendor or any former owner has ever insured the buildings on the property, with any Mutual Insurance Company, because the property will, in such a case, be liable to the amount of the premium note given by the assured, and of the assessment thereon, for a proportionate part of any losses or expenses accruing to the Company during the continuance of the policy.

The statute⁹ relating to Mutual Insurance Companies provides, that "all the right and estate of the assured, at the time of insurance, to the buildings insured by the Company, to the lands on which the same stand, and to all other lands thereto adjacent, mentioned and declared liable in the policy of assurance, shall stand pledged to the Company; and the Company may sell, demise or mortgage the same or any part thereof, to meet the liability of the assured, for his proportion of any losses or expenses accruing to the Company during the continuance of his policy, which sale, demise or mortgage, shall be made in the manner specified in the policy of the assured."

8. Con. Stat. U. C. c. 54, s. 342, sub. sec. 5; 29 & 30 Vic. c. 51, s. 344, sub. sec. 6.

9. Con. Stat. U. C. c. 52, s. 67.

The inquiry as to such liens is an exceedingly important one, and should never be overlooked, because it is not necessary in order to preserve the lien of the Company, that any instrument should be registered charging the lands mentioned in the policy.

In *Montgomery v. The Gore District Mutual Insurance Company*,¹ Vankoughnet, C. said, "I regret, contrary to my first impression, to have to come to the conclusion that such a policy of assurance, or such an assurance as is made the subject of consideration here, does not fall within the operation of the registry laws. In the first place, the legislature, in the act creating the lien, do not appear to contemplate that it should. They subject the right and estate of the assured in the land at the time of insurance to the claims of the company. Now, the insurance may be effected without the issuing of a policy. The policy is but evidence of the insurance. * * * *
But however this may be, suppose the policy made out, how are the company to register it? It is not pretended they are to register anything else. The moment the policy is prepared, subject to the delivery of the note, and perhaps to the payment of the instalment by him, as provided for in the 22nd section of the act, it becomes the property of the assured. What right have the Company to register it, and how can they register it? It is not a deed to them; it is a deed by them. It is the property of the assured from the moment it is ripe for delivery. But the chief difficulty lies in the machinery by which registration is to be effected. The registry laws require that the instrument of which the memorial is to be put on registry shall, for the purpose of procuring such registration, be produced to the Registrar, and that he shall thereon, immediately after the registration, indorse a certificate thereof. I do not see how the

1. 10 Grant, 504.

company, after the policy has become complete, and the property of the assured, can insist upon retaining it for the purpose of registration, and if they cannot do so, they are not blameable because it is not registered; and they cannot, therefore be deprived of the lien which the law, without insisting upon registration, has given to them."

7. Dower.

If there is any deed in which the grantor's wife has not joined to bar her dower, or if the title is derived under a will or by inheritance, a claim for dower may exist.

In such a case, evidence that the grantor or testator was unmarried should be called for, or if married, then proof of the widow's death, or that under the will she was put to an election between her dower and some other benefit, and that she has exercised her election by taking the substituted devise.

To consummate the right to dower, three things are requisite, viz.: marriage, seisin, and the death of the husband.²

It is not necessary, in order to establish a widow's right to dower, to prove the marriage by persons who were present at the ceremony;³ evidence of cohabitation and reputation of marriage is sufficient.⁴

It is necessary, that the husband of the woman claiming dower must have had seisin of the lands and tenements out of which dower is claimed during the coverture.⁵

Possession and receipt of rents has been held *prima facie* evidence of seisin; but in another case it was held

2. Co. on Litt 31.

3. Phipps v. Moore, 5 Q. B. U. C. 16.

4. Graham v. Law, 6 C. P. U. C. 310.

5. Parke on Dower, 24.

that the demandant could not be allowed to recover on mere evidence of possession by her husband, without proving his title.⁶

By the Consolidated Statute of Upper Canada⁷ relating to dower, "When a husband hath been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same although her husband did not recover possession thereof; but such dower shall be sued for or obtained within the period during which such right of entry or action might be enforced."

Since 6th March, 1834, a widow is also entitled to dower out of equitable estates; the statute⁸ providing, that "When a husband dies beneficially entitled to any land for an interest which does not entitle his widow to dower out of the same at law, and such interest whether wholly equitable or partly legal and partly equitable, is an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy), then his widow shall be entitled in equity to dower out of the same."

It will be observed that while all that is necessary to entitle a woman to dower at law, out of lands where the husband had the legal estate, is that the husband should have been seised during the coverture, it is necessary to give her dower in an equitable interest, that the husband should die entitled thereto.

Dower may be barred, since the 11th day of May, 1839, by the wife joining in a deed or conveyance of the land, containing a release of dower,⁹ but before that

6. Draper on Dower, 28.

7. Cap. 84, s. 2.

8. 4 Wm. 4, c. 1, s. 18; Con. Stat. U. C. c. 84, s. 1.

9. Con. Stat. U. C. c. 84, s. 4; and see *Heward v. Scott*, 2 Chan. Cham. R. 274.

date it was necessary to render a bar of dower effectual, that the wife should be examined apart from her husband as to her consent to be barred of her dower, and that a certificate of such examination should be endorsed upon the deed.¹

It is still necessary where a woman bars her dower by a deed to which her husband is not a party, that she should be examined, and the fact of the examination certified on the deed.²

By an Act passed in 1861, it is enacted that no action of dower can be brought, in case the claimant joined in a deed to convey the land or release dower therein to a purchaser, though the acknowledgment required by law at the time, may not have been had, or though any informality may have occurred in respect thereof.

A writer on the law of dower³ has expressed the opinion that by this statute acknowledgments of bar of dower, as formerly required, appear to be abolished; but this view has not generally been adopted by the profession.

A sale of the land by the Sheriff under an execution against the husband, does not defeat the wife's right to dower;⁴ but a sale and conveyance by the Sheriff for taxes does.⁵

Dower will be barred if not sued for within twenty years after the husband's death.⁶

8. *Curtesy.*

Tenancy by the curtesy is like dower an estate for

1. 37 Geo. 3, c. 7; 48 Geo. 3, c. 7; 50 Geo. 3, c. 10.

2. Con. Stat. U. C. c. 84, ss. 6, 7, 8, 9.

3. Draper on Dower, 44.

4. Draper on Dower, 45.

5. Tomlinson v. Hill, 5 Grant, 231.

6. 24 Vic. c. 40, s. 18; Ont. Stat. 32 Vic. c. 7, s. 22.

life, but differs from dower in being for the whole estate of the wife, not a third merely. It is also necessary to entitle the husband to be tenant by the curtesy, that there should be issue of the marriage, capable of inheriting, born alive during the lifetime of the mother.⁷

When the title depends on inheritance from a married woman, her husband may, therefore, be entitled to an estate for life in the lands, and evidence of his death should be called for, or a release of his interest procured.

9. *Legacies.*

Legacies charged upon lands form a lien upon the property for twenty years from the time at which they become payable. Where, therefore, the title is derived under a will charging legacies upon the land devised, proof of payment, or that they have been released must be called for.

The lapse of even twenty years is not sufficient to raise a presumption of payment, but after forty years, if possession has gone with the devise, payment may be presumed.⁸

If the land is charged with the payment of an annuity its discharge must be proved in the same way as the release of a legacy.⁹

The period within which an annuity may be presumed satisfied must depend on the life for which it is granted. If it is fair to presume, in the natural course of things, that the annuitant is dead, the want of a certificate of burial cannot be considered as an insuperable objection to the title, but no case has occurred in which such a presumption has been made in less than thirty years.¹

7. Co. on Lit. 29 b. ; Blissett on Estates, 49.

8. Cov. Con. Ev. 287.

9. Cov. Con. Ev. 294.

1. Ibid.

CHAPTER IV.

PARTICULAR TITLES.

1. *Possession.*

It is not necessary that there should always be deeds or wills produced affecting the property in question during the period for which a title is required to be shown. Possession of itself is a sufficient title, and could it always be clearly shown to have been undisturbed, would, no doubt, be the best of titles.² But as it is difficult to show that possession has never been disturbed, a title where no deeds exist, should be rigidly enquired into and strictly proved.³

In *Cottrell v. Watkins*,⁴ the Master of the Rolls said "I am perfectly satisfied that there are good titles in which the origin cannot be shown by any deed or will; but then you must show something that is satisfactory to the mind of the Court,—that there has been such a long uninterrupted possession, enjoyment and dealing with the property as to afford a reasonable presumption that there is an absolute title in fee simple."

In another case⁵ it was said, "a party seeking to establish a title by possession against a paper title, and thus to usurp the place of the rightful owner, and supplant him, must do so by clear evidence admitting of no reasonable doubt."

A title by possession though less satisfactory than one which can be traced to the patentee from the Crown, is

² Lee on Abs. 26; Dart on Vendors, 197.

³ Lee on Abs. 27.

⁴ 1 Beav. 365.

⁵ Low v. Morrison, 14 Grant, 195.

a title which under an ordinary contract of purchase, a purchaser is bound to accept if duly verified.⁶

Lord St. Leonards, in *Scott v. Nixon*,⁷ said, "can this Court compel a purchaser to take a title depending upon parol evidence of adverse possession, under the new statute? Under the old statute it was long undecided whether a purchaser could be forced to take such a title, but ultimately it was so determined, and I apprehend that it was quite settled, that a clear title, and just as good as any other title, might be acquired by adverse possession, and that a purchaser would be bound to take such a title."

In the subsequent case of *Tuthill v. Rogers*,⁸ his Lordship said, "Upon a former occasion I was called on to decide whether this Court would enforce, as against a purchaser, a title depending on non-claim, between subject and subject; and I was of opinion that it did not matter how the title was acquired, if it were a good one; * * * I held that the Court was bound to force the title on the purchaser, and that decision has been acquiesced in."

To force such a title on a purchaser, it is not sufficient merely to show possession by the vendor for twenty years. If the vendor relies on a possession of twenty years as giving him a good title, he must show who the person is, that but for this possession would be the owner in fee simple in possession; and that twenty years possession barred his right.

This it would not do, for example, if, when the twenty years began to run, such owner was an infant, under coverture, an idiot, lunatic, or of unsound mind. In that

6. *Dart on Vendors*, 264; *Sug. V. & P.* 389; *Darby on Limitations*, 389; *Hyde v. Dallaway* 6. Jur. 119.

7. 3 Dru & War. 405.

8. 1 J. & L. 72.

case,⁹ "such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or rent, at any time within ten years next after the time at which the person to whom such right shall have first accrued, as aforesaid, shall have ceased to be under any such disability, or shall have died, (which shall have first happened)."

The statute just quoted, in its terms extended to persons "absent from Upper Canada;" but by a more recent Act,¹ "any plaintiff or person in any action, suit or proceeding, either at law or in equity, who has been or is resident without or absent from Upper Canada, shall have no greater or longer period of time to bring, commence or prosecute any such suit, action or proceeding, by reason of such non-residence in, or absence from Upper Canada, than if such plaintiff or person had been or were resident in Upper Canada, when the cause of such action, suit or proceeding first accrued; and all and every exception or distinction in any law or statute relating to the limitation of actions now in force in Upper Canada, in favor of any plaintiff or person resident without or absent from Upper Canada, by whatever terms or words such residence without or absence from Upper Canada, is stated or described in such law or statute, shall be and the same are hereby abolished and repealed."

In *Low v. Morrison*,² it was argued by counsel, that by this act, only the remedy, and not the right was barred; and that if the party could assert his right without action, he might yet do so unaffected by the statute. But Vankoughnet, C., in giving judgment said, "I leaned

9. Con. Stat. U. C. c. 88, s. 45.

1. 25 Vic. c. 20, s. 1.

2. 14 Grant, 192.

much to that view until I came to consider the 16th section of the Consolidated Statute,³ which enacts that at the determination of the period limited by this act, to any person for bringing any action or suit, the right and title of such person to the land, for the recovery of which such action might have been brought within such period, shall be extinguished."

"Reading the 25th Vic. as abolishing the extended period for bringing an action formerly given to absentees, and as limiting it to twenty years, I must apply the 16th section of the Consolidated Statute, and hold that after the lapse of twenty years, the right and title of the absentees are extinguished. This law, if harsh, and all *ex post facto* laws are more or less unjust, the Legislature is responsible for. They, however, gave absentees a year within which to avail themselves of an existing disability—whether or not this was sufficient to save existing rights is not for me to say—I must adjudicate that the right and title of the absentee are gone equally with those of the resident, where there has been a possession for twenty years adverse to the right or title."

It must also be borne in mind, that the possession for twenty years will bar only the party entitled to the immediate possession of the land. It will not operate to defeat the right of a person entitled in reversion, until the expiry of twenty years from the time when the particular estate determined, and the reversioner acquired the right of entry.⁴

The first section of the Statute,⁵ provides, that no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years after the time at which the right to make such entry or distress accrued; and the second section, sub-section four,

3. Con. Stat. U. C. c. 88.

4. 1 Hayes Conv. 263; Darby on Limitations, 890.

5. Con. Stat. U. C. c. 88.

says, that in case of future estates, "such right of entry shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession."

The effect of the statute must, therefore, always be determined with reference to the actual state of the title when the time began to run, so that if the fee should then have been parcelled out in particular estates and remainders, the title acquired by means of the statute would, for the most part, be commensurate only with the estates of those persons whose rights may from time to time have accrued.⁶

The state of the title when the time begins to run is what has to be considered, for when the statute has once begun to run, a party cannot, by settling his estate, raise up new rights and give new claims to persons deriving under the settlement.⁷

And Mr. Hayes lays it down⁸ as undoubted, that "the effect of the statute must always be determined with reference to the actual state of the title when time begins to run, and that when the time has once commenced running, no subsequent alteration in the title will postpone the bar."

The condition of the land itself at the time possession was taken must also be shown, because if it was in a state of nature, forty years possession may be necessary to constitute a bar.

By the 27 & 28 Vic. c. 29, sec. 3, it is enacted that, "In the case of lands granted by the Crown of which the grantee, his heirs or assigns, by themselves, their servants or agents, have not taken actual possession by residing upon or cultivating some portion thereof, and in case

6. 1 Hayes Conv. 257.

7. Staepoole v. Staepoole, 4 Dru. & War. 347.

8. 1 Hayes Conv. 257.

some other person not claiming to hold under such grantee has been in possession of such land, such possession having been taken while the land was in a state of nature, then unless it can be shown that such grantee or such person claiming under him while entitled to the lands had knowledge of the same being in the actual possession of such other person, the lapse of twenty years shall not bar the right of such grantee or any person claiming under him to bring an action for the recovery of such land, but the right to bring such action shall be deemed to have accrued from the time that such knowledge was obtained ; provided always, that no such action shall be brought or entry made after forty years from the time such possession was taken as aforesaid."

The limitation of time to forty years was added by the Act above quoted, the original Act,⁹ not having expressed any limit to the time within which the action might be brought, except twenty years after acquiring knowledge of the possession.

To give a good title by possession, it must be shown to have been continuous ;¹ a person who takes possession of land without title has, while his possession continues, and before the statutory period has expired, a transmissible and inheritable interest in the property. That interest may, it is true, be defeated at any moment by the entry of the rightful owner, but if he is succeeded in the possession by one who claims through him, and who holds until the expiration of the statutory period, such successor has then as good a right to the possession as if he had himself occupied for the whole period.²

But if a series of trespassers, adverse to one another, and to the rightful owner, take and keep possession of an estate in succession for various periods, each less than

9. 4 Wm. 4, c. 1, s. 17 ; Con. Stat. U. C. c. 88, s. 3.

1. *Young v. Elliott*, 25 Q. B. U. C. 333.

2. *Asher v. Whitlock*, L. R. 1 Q. B. 1 ; *Keefe v. Kirby*, 6 Ir. C. L. R. 591.

twenty years, but exceeding in the whole twenty years, in whose favour is the right to be declared? The right view seems to be, that the first of such trespassers, has, at the end of twenty years from his entry a right to the possession.

Possession being *prima facie* evidence of seisin in fee,³ the mere fact of priority of possession is sufficient proof of title on which a man can maintain ejectment against any person who was let into possession by him, or who came in as a wrong doer, while, therefore, the trespasser who is in possession at the time when the twenty years expires, can maintain his possession against the rightful owner, because his title is extinguished, yet he is liable to be ejected by any one who had possession of the property prior to himself but within twenty years, though without any better title.⁴

In this country the question of title by possession, as against a paper title, often presents peculiar features, and is not always a matter of easy solution.⁵ Thus the question has sometimes arisen whether the occupation of part of a lot of land will give title by possession to the whole. The present current of authority seems to be, that such a possession will confer title only to the part actually occupied.

This was the decision of the Court of Queen's Bench in *Hunter v. Farr*,⁶ when C. J. Draper, in delivering judgment, said, "If a man has title to a lot of land, though he has never entered into the actual possession of it, the law deems him to be in possession until some one else enters adversely to him, not recognizing his title, and so *a fortiori* if he enters and occupies part. If without title he enters on a lot which is in a state of nature,

3 Darby on Limitations, 390.

4 Doe d. Willis v. Birchmore, 9 A. & E. 602; Asher v. Whitlock, L. R. 1 Q. B. 1; Groome v. Blake, 8 Ir. C. L. R. 432.

5 Dundas v. Johnston, 24 Q. B. U. C. 547.

6 23 Q. B. U. C. 327; and see Doe d. McDonnell v. Rattray, 7 Q. B. U. C. 321.

clearing and fencing a few acres only, leaving the rest open and unimproved, the actual possession of the part will not alone, in my opinion, draw to it the possession of the other part."

In *McMaster v. Morrison*,⁷ V. C. Mowat, before whom the case was heard, followed the decisions at law, and the plaintiff having failed to prove that the testator exercised any acts of ownership on any portion of the lot except what he cleared, or that he was more than a mere trespasser in respect of even that portion, the learned Vice Chancellor said, "under these circumstances, he cannot, according to the authorities, be held to have been constructively in possession of any part of the lot of which he was not in actual possession."

The same point was afterwards decided in the same way by the Chancellor in *Low v. Morrison*,⁸ and also by Vice Chancellor Sprague in *Wishart v. Cook*.⁹

Although in *McMaster v. Morrison*, V. C. Mowat seems to have founded his judgment upon the fact that no proof was given that the party in possession was more than a mere trespasser, yet it is probable, that following as he did the decisions at law, the learned Vice Chancellor would have come to the same conclusion, even had it been shown that the party was in possession under an apparent title, or had some show of right.

In *Dundas v. Johnston*,¹ it is true the language used refers solely to occupation without any title; Draper, C. J., saying, "when, therefore, a person without any title, or without any real or bona fide claim of title, (though erroneous) entered upon any such lot, clearing and fencing only a portion thereof, I do not understand upon what principle this wrong doer can be deemed to have

7. 14 Grant, 188.

8. 14 Grant, 192.

9. 15 Grant, 237.

1. 24 Q. B. U. C. 550.

taken, and to be in possession of the whole of such lot:— for example, of 200 acres, if the lot was originally surveyed to contain that quantity, or of the half or quarter lot, if such had been the division of the original survey; or that his cultivation and fencing of a small part puts him into possession of as much, (be it the whole or a fractional part of a lot) as the proprietor of the part trespassed upon owns. In cases of what is well understood in the country by the term “squatters,” I have always thought that as against the real owner they acquire title by twenty years occupation of no more land than they actually have occupied, or at least over which they have exercised continuous and open notorious acts of ownership, and not mere desultory acts of trespass in respect of which the true owner could not maintain ejectment against the trespasser as the person in possession.”

In the subsequent case of *Young v. Elliott*,² the Court came to the same conclusion as in *Dundas v. Johnston*.

As the law now stands, it would, therefore seem that a party in possession without a paper title, acquires title only to that part of the lot actually occupied by him. Perhaps fuller and further argument may lead to a different conclusion being arrived at.

In the case of a person taking possession of land already cleared and cultivated, when he confines his occupation to a part only of the lot, cultivating that and that only, and allowing the remainder to lie waste, it may be reasonable to assume that such an occupation will confer title only to the part actually occupied. But in the case of wild lands, where, unless a man goes to great expense in the way of fencing to enclose the whole lot, his visible possession and exercise of acts of ownership must be confined to the portion he may clear up and bring under cultivation, it would seem more rea-

² 25 Q. B. U. C. 334.

sonable to treat such occupation as possession of the whole lot.

Indeed, in *Dundas v. Johnston*,³ the Court of Queen's Bench said, "It must depend upon the circumstances of each case, whether the jury may not, as against the person having the legal title, properly infer the possession of the whole lot covered by such a title, in favor of an actual occupant, though his occupation by open acts of ownership such as clearing, fencing and cultivating, has been limited to a portion less than the whole."

In a recent case,⁴ C. J. Hagarty in delivering judgment said, "We are not prepared to hold that unenclosed wood land in this country can never be the subject of a twenty years' possession. If fencing and cultivation can alone constitute a possession, then title to open wood land can never be acquired against the true owner."

2. *Inheritance.*

A title may also depend upon descent, but such a title is always to be viewed with great jealousy;⁵ indeed it is said to be ranked by conveyancers among the worst of titles; and if it depends upon several successive descents, it is scarcely marketable.⁶

To prove a pedigree, the object is to show that the claimant is the next heir to the person last seised.

In questions of pedigree the conveyancer requires the same proof of relationships, deaths and intestacies as Courts of Justice.⁷

Of the intestacy of the ancestor the best evidence is the production of letters of administration taken out to his effects from the Surrogate Court.⁸ But although let-

3. 24 Q. B. U. C. 550.

4. *Heyland v. Scott*, 19 C. P. U. C. 172.

5. *Atkinson on Titles*, 374.

6. *Hubback on Suc.* 71.

7. *Cov. Con. Ev.* 274.

8. *Cov. Con. Ev.* 277; *Lee on Abs.* 315; 2 *Preston on Abs.* 454; *Dart on Vendors*, 222.

ters of administration are much relied on by conveyancers, implicit reliance cannot be placed on them. They are granted by the Surrogate Court upon the affidavit of the nearest relation that no will of the deceased has been discovered, and this it is evident can never be conclusive evidence that there is no will in existence.⁹

The weight to which they are entitled depends much upon the time which has elapsed since they were granted; twenty years may entitle them, if acted upon, to great weight, and to be regarded as presumptive evidence, almost incontrovertible, that no will has been found; but two or three years elapsed are not sufficient to warrant a purchaser in relying upon a grant of administration, without other evidence of intestacy, or at least, without making further enquiry.¹

It is also sometimes required that administration should be taken out for the purpose of obtaining the administrator's affidavit of belief that the ancestor died intestate,² and undoubtedly letters of administration afford the most public proof that no will exists; but the opinion of the profession is against the purchaser having a right to insist upon such a proceeding.³

When forty years have elapsed since the death intestate of a former owner seised in fee simple in possession, the Statute of Limitations may be relied on as against the claim of any latent heir,⁴ as his right of action must have accrued at the death; but if the intestacy is disputed and there be reason to apprehend the existence of a will, whose contents are unknown, the statute is a very slight protection; as limitations may have been created, under which a right of action may exist for an indefinite period.⁵

9. Lee on Abs. 315.

1. Lee on Abs. 315; Dart on Vendors, 225.

2. Hubback on Suc. 65.

3. Lee on Abs. 316.

4. Lee on Abs. 467.

5. Dart on Vendors, 265.

Proof of intestacy may also be given by producing a will or probate not passing the real estate in question, and not putting the heir to an election.⁶

Where a will was executed, a purchaser from the heir or from one claiming through him has a right to insist upon its being produced, that he may satisfy himself of its inefficiency, even although having been treated as a nullity by a professional man, it has been mislaid, and the vendor being heir has rested upon his title as such.⁷ But he cannot insist upon a covenant for its production, even though unproved, since it is merely negative evidence.⁸

Where a person deduces his title as heir general at common law of his father, evidence is required not only that he is the legitimate son, but in the event of the ancestor's death before the 1st of January, 1852,⁹ that he is the eldest or only son of his parents.¹

Certificates of his parents' marriage, and of his own baptism within a reasonable period after the marriage, are admitted as full and ample evidence of legitimacy, without any proof of the identity of the parties.²

To prove the pedigree of a second son, certificates of the marriage of his father and mother, of the baptism of himself and eldest brother, and of the burial of his eldest brother, are the best and appropriate evidence;³ there should also be strong negative evidence that the eldest brother died without issue. If this is not apparent from a certificate of his burial, stating his age and bachelor-

6. *Ibid.*, 225; Hubback on Suc. 65.

7. *Stevens v. Guppy*, 2 S. & S. 439; Hubback on Suc. 65.

8. Hubback on Suc. 65.

9. Con. Stat. U. C. c. 82.

1. 1 Byth, 149.

2. Cov. Con. Ev. 278.

3. Cov. Con. Ev. 279.

hood, an affidavit from some member of the family, or acquaintance, should be procured, testifying his belief that the party was either never married, or if married, never had any issue, or that such issue, if any, died in infancy, &c. The deponent should also state that he was intimately connected or acquainted with the family, and must have known of such issue if there had been any.

If the elder brother left issue, proof of their death should be required; and the like evidence that the issue left no issue.

To prove the pedigree of a third or fourth son similar evidence is required, in each case accounting for all who would have inherited before him.

In proving the title of daughters, the same evidence must be given, the death of all the sons, (if any) without issue, must be proved, and also the death of any of the claimant's sisters who are dead, and that they died without issue.⁴

Where the ancestor died since the first day of January, 1852, the proof should consist of certificates of the parents' marriage, and proof that the claimants are the only children of the marriage. If any of them are dead without issue, the fact of their death, and that they left no issue must be proved. If they did leave issue, the issue must in like manner be accounted for.

The proof of a collateral heirship, as of brothers, uncles, aunts or cousins, must be supported in the same way.⁵

Great difficulty is frequently experienced in giving

4. Cov. Con. Ev. 280.

5. Cov. Con. Ev. 280.

direct proof of the fate of persons who have gone abroad and who have never afterwards been heard of, that these persons died without issue, or that such issue has become extinct. These are difficulties which a Court of Equity would never compel an unwilling purchaser to accept, unless the lapse of time be such as to raise a violent presumption in favour of the continuing and uninterrupted possession.⁶

A seven year absence without tidings, though it prevails as evidence of death in ejectment, is clearly insufficient between vendor and purchaser, that the title is good against all the world, and not merely as sufficient to prevail as against certain contending parties.⁷ No certain period can be fixed upon, which will raise such a presumption; every case must depend on its own particular circumstances. The presumption of death has been admitted in one case after twenty years;⁸ in another case after fourteen years;⁹ and in a third after sixteen years;¹ but in a recent case,² after absence and silence for nineteen years, the Court refused to presume death, when the circumstances rendered it improbable that the party, if alive, would have communicated with her friends.

Scarcely any length of time will, however, be sufficient to compel an unwilling purchaser to take a title depending on such a presumption of death, unless made with reference to the age of the party said to be deceased; and if the party whose death is asserted was, when last heard of, very young, the period must be that beyond which human life does not commonly extend.³

If the point to be proved, or rather to be presumed, is,

6. *Gov. Con. Ev.* 280.

7. *Dart on Vendors*, 228; *Hubback on Suc.* 179.

8. *Bailey v. Hammond*, 7 *Ves.* 590.

9. *Lee v. Willock*, 6 *Ves.* 605.

1. 5 *Ves.* 458.

2. *Bowden v. Henderson*, 2 *Sm. & G.* 560.

3. *Lee on Abs.* 467.

death without issue, it is questionable whether a Court would, as against a purchaser, ever make the presumption within the period of sixty years.⁴

It may be added that in cases of pedigree, persons presumed to be dead, are presumed to have died unmarried and without issue.⁵

A certificate of baptism is no evidence of the exact age of a party; it is good evidence of his legitimacy but not of his age.⁶ If the clergyman has, however, entered the age of the infant, the conveyancer receives the certificate as *prima facie* evidence of the age, though it would not be evidence on that point in Court.

Declarations of a deceased parent are evidence of the time of a child's birth;⁷ and an entry by a man midwife of his having delivered a woman of a child on a certain day, referring to his ledger, in which he had made a charge for his attendance, which was marked paid, has been received as evidence.⁸

The regular proof of the celebration of a marriage is the certificate of the clergyman who performed the ceremony, such certificate being one which he is required by statute⁹ to give the parties if they desire it; or the evidence of parties present at the marriage. In case of the absence or death of the witnesses present at the marriage, a certified copy, by the Registrar of the County, of the return made to him by the clergyman who performed the ceremony is made sufficient evidence by the statute.¹

In the case of old marriages, where the parties have

4. *Ibid*, 467.

5. *Doe d. Oldham v. Wolley*, 8 B. & Cr. 22; *Doe d. Bauling v. Griffin*, 15 East, 293.

6. *Cov. Con. Ev.* 231.

7. *Ibid*, 232.

8. *Higham v. Ridgway*, 10 East, 109.

9. *Con. Stat. U. C. c. 72, s. 4.*

1. *Ibid*, sec. 7

been long dead, and the place of the marriage is unknown, resort must often be had to the presumptive evidence of general reputation.² The chief danger attending presumptive evidence of marriage is, that such evidence may be rebutted by either of the parties; but after the death of both parties such evidence may be safely relied on.³

3. *Wills.*

If the title is derived under a will, the probate, or a copy stamped with the seal of the Surrogate Court,⁴ is ordinarily sufficient proof of the will as between vendor and purchaser;⁵ and the purchaser's solicitor may, as in the case of a deed, presume due execution according to the purport of the will.

He will observe, whether it purports to have been executed in the presence of two witnesses, and, whether the attestation clause states that they subscribed in the presence of each other.⁶ If it does not, an affidavit by one of the subscribing witnesses or some other person who saw the will signed, testifying the actual fact, may be called for.⁷

The Court of Common Pleas has, however, decided⁸ that it is not necessary that the witnesses should subscribe in the presence of each other; their subscribing in the presence of the testator is sufficient, though they do not subscribe in the presence of each other.

In the case referred to, the Court held that the statute which says, "It shall be sufficient if such witnesses subscribe their names in presence of each other, although

2. 1 Byth 168; Cov. Con. Ev. 285.

3. 1 Byth. 168; Cov. Con. Ev. 283.

4. Con. Stat. U. C. c. 16, ss. 3, 51.

5. Cov. Con. Ev. 91, 92.

6. Con. Stat. U. C. c. 82, s. 13.

7. Cov. Con. Ev. 94, 97.

8. Crawford v. Curragh, 15 C. P. U. C. 55.

their names may not be subscribed in presence of the testator ; ”⁹ does not repeal the clause in the Statute of Frauds relating to wills,¹ but merely extends it, and that therefore, a will subscribed by the witnesses in accordance with the provisions of either act, is sufficiently attested.

In delivering judgment, A. Wilson, J. said, “The statute of Charles has not, in express terms, been repealed as to wills ; and, so far as it has not been repealed by enactments inconsistent with its maintenance in part or in whole, there is no reason why it may not be considered as still an active law here. Now, under that statute it was a positive direction that the witnesses should subscribe and attest the will *in the presence of the devisor*, otherwise the will should be utterly void and of none effect.”

“There is nothing inconsistent in our amended law and this provision subsisting together : on the contrary, it rather seems that the Legislature intended that this part of the old law should yet continue to be the law ; leaving it, however, to the devisor to pursue either the new law or the old law, according to circumstances or his own convenience—that is either to see the witnesses subscribe the will, or if he did not, that they should see each other subscribe it, and, therefore, we are of opinion that, under the provision, “It shall be sufficient if such witnesses subscribe their names in presence of each other, *although their names may not be subscribed in presence of the testator*,” the law of this province does not prevent a will being still subscribed by the witnesses in the presence of the devisor, as it might have been before the passing of the late act, under the Statute of Charles ; and that the new provision has extended the old law by making it *sufficient* if the witnesses see each other sub-

9. Con. Stat. U. C. c. 82, s. 13.

1. 29 Car. 3, c. 3, s. 5.

scribe the will, although the devisor may not have seen them."

"We are of opinion, then, that, although the will was not subscribed by the witnesses in the presence of each other, it was not, nevertheless, void for that reason, but that a subscription by them in the presence of the devisor was, if it be established, a sufficient subscription according to our law."

If the testator was a marksman, the attestation should state that the will was read over and explained to him, and if the attestation is silent as to this the purchaser may require proof from one of the witnesses or some other person present, that the will was read over and explained.²

Where the will has not been proved the vendor must produce the original, if it happens to be in his possession.³ If the will relates to real estate only, and has been neither proved nor registered, or if relating to personal estate also, it has not been proved, inquiry should always be made as to the reason for this omission. The will may have been revoked by the testator, and the enquiry may lead to the discovery of this.

Where a will has been executed, it must be produced before a purchaser can be compelled to accept the title,⁴ although having been treated as a nullity by a professional man, it has been mislaid, and the vendor being heir, has rested upon his title as heir.⁵

The exact terms of the devise through which the vendor claims, and the effect of the words used, must be carefully considered, as difficulties of construction often arise.

2. *Cov. Con. Ev.* 95.

3. *Sug. V. & P.* 414.

4. *Hubback on Suc.* 65.

5. *Stevens v. Guppy*, 2 S. & S. 439.

The general rule as to the admissibility of parol evidence in the construction of wills is, that if there be a latent ambiguity raised by extrinsic circumstances, it may be explained by the same means, but if the ambiguity be patent, that is, arising on the face of the will itself, all reference to matters dehors the instrument is, as a general rule, strictly forbidden.⁶

In the case of wills executed by persons dying before the first day of January, 1869, the will was construed as speaking from the date of its execution, and property acquired by the testator after the date of the will, did not pass under the will. If, however, in the case of any person dying after the 6th day of March, 1834, the will contains "a devise⁷ in any form of words of all such real estate as the testator shall die seised or possessed of, or of any part or proportion thereof, such will shall be valid and effectual to pass any land that may have been or may be acquired by the deviser after the making of such will, in the same manner as if the title thereto had been acquired before the making thereof."

In the case of *Whateley v. Whateley*,⁸ where the words of the will were, "I give all my real and personal estate to my executors and trustees for the purposes of this my will;" V. C. Mowat, after quoting the words of the statute,⁹ said, "I see no sufficient reason why such a devise as this will contains, should not be held a sufficient compliance with this provision. * * * I think that a devise in this form shows an intent to pass all the testator should have at his death, and that all the statute demands is a devise in any form of words which shows such an intent."

On a rehearing of the case,¹ the decree pronounced by

6. Taylor on Ev. 944; Cov. Con. Ev. 103.

7. Con. Stat. U. C. c. 82, s. 11.

8. 13 Grant, 436.

9. Con. Stat. U. C. c. 82, s. 11.

1. 14 Grant, 430.

V. C. Mowat was reversed; the Chancellor and V. C. Spragge holding that a devise in such a general form was not sufficient to pass after-acquired estate. The Chancellor in delivering his judgment said, the Legislature "are careful, merely to say that, if the testator *in any form of words* devises after-acquired real estate, it shall pass. They have not said, that without any such form of words it shall pass under a mere general devise of realty. To hold that this was the meaning of the Legislature would be to reverse the whole law as it then stood, and to require that, where parties did not intend their after acquired property to pass, they should use restrictive words. But the Legislature have not said this. It seems to me that they leave the law as it was, unless the parties choose to extend the operation of the will by some form of words embracing after-acquired real estate." And V. C. Spragge said, "In a will of personal estate there is an expressed intention that it should be a bequest of what the testator has at the time of his death, because the law gives his words expression as at the time of his death. But our statute making no such rule as to real estate, requires the testator to express an intention as to after-acquired property if he has such intention. The language of the Statute "a devise *in any form of words* of all such real estate as the testator shall die seised or possessed of," implies or rather requires that the testator must in some form of words express it to be his intention to devise his after-acquired real estate. The words "I give or I devise all my real estate," do not import such intention: the reason being wanting, which, in the case of personal estate, imputes such intention to the testator. There is, however, this point in the case before us. The testator joins together his real and personal estate making one disposition of both in these words, "I give all my real and personal estate." Is that a form of words denoting an intention to devise after

acquired real estate? or may it not with equal propriety be said that they denote an intention on the part of the testator to limit his bequest of personal estate to what he then possessed? I think the proper construction of the will, is to read it, as to each kind of property, as the law requires it to be read, if each were expressed separately."

Although two members of the Court took this view of the statute, V. C. Mowat adhered to his original judgment, and after remarking that "the leading principle according to which wills are interpreted, is the intention of the testator;" and reviewing at length the authorities bearing on the subject, he said,² "I read the clause in our act as rendering valid devises of after-acquired real estate, and requiring for this purpose nothing more than any words which show the intent to pass the property. Thus, if a testator having contracted and paid for land Blackacre makes a will, and subsequently obtains the conveyance, his devise of Blackacre by description would, I apprehend, give the devisee the legal as well as equitable estate therein; for it is surely not necessary for this purpose that the will should be expressed as devising any or all "the estate in Blackacre that the testator may die seised of." To require a residuary or general clause to make an express reference to after-acquired property appears to me to be demanded by no sound rule of construction; to serve no good purpose; to create an unnecessary and indefensible distinction between the words which pass after-acquired personal estate;—and to force upon wills wherever the rule is applied, a meaning and an effect contrary to the intention of the testator."

Now, however, the law has been altered, and by an act of the Legislature of Ontario,³ it is provided, where the devisor dies after the 1st day of January, 1869, that,

2. *Ibid*, 443.

3. Ont. Stat. 32 Vic. c. 8.

"Every will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will."

"No⁴ conveyance or other act made or done subsequently to the execution of a will, of or relating to any real or personal estate therein comprised, (except an act by which the will is revoked), shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of at the time of his death."

"Every⁵ will shall be revoked by the marriage of the testator, except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would, in default of such appointment, pass to the testator's heir, executor or administrator, or the person entitled as the testator's next of kin under the statute of distributions."

"No will⁶ shall be revoked by any presumption of an intention on the ground of an alteration in circumstances."

"No will⁷ or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed according to law, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is by law required to be executed, or by the burning, tearing or otherwise destroying the same by the testator, or by some one in his presence and by his direction, with the intention of revoking the same."

The original English Statute of wills,⁸ authorized

4. Sec. 2.

5. Sec. 3.

6. Sec. 4.

7. Sec. 5.

8. 32 Hen. 8, c. 1.

every person having lands, &c., to devise them; and under that statute it was the opinion that a married woman could not make a valid will of lands. But as "divers doubts, questions and ambiguities" had arisen, or were apprehended on that and other points, the statute 34 & 35 Hen. 8, c. 5, was passed to remove them, and by the 14th section of that act such devises by married women were expressly prohibited.

A married woman may, however, make a testamentary disposition of her real estate under a power,⁹ by way of execution of such power; and equity will carry into effect the will of a married woman disposing of her real estate in favour of her husband, or other persons than her heirs at law, provided the will be in pursuance of a power reserved to her.¹ The power to make a testamentary disposition of her estates may be conferred upon a married woman by a settlement either before marriage or subsequently thereto; and it may emanate either from her husband or from a third person. It should appear upon the face of the will, made by a married woman, that it is made in pursuance of the power.

By the statute giving married women certain separate rights of property,² "From and after the said 4th day of May, 1859, and hereafter, every married woman may, by devise or bequest executed in the presence of two or more witnesses, neither of whom is her husband, make any devise or bequest of her separate property, real or personal, or of any rights therein, whether such property was or be acquired before or after marriage, to or among her child or children issue of any marriage, and failing there being any issue, then to her husband, or as she may see fit, in the same manner as if she were sole and unmarried; but her husband shall not be deprived by

9. Lovelass on Wills, 267.

1. Wright v. Englefield, Amb. 468; S. C. nom. Wright v. Cadogan, 2 Eden, 239.

2. Con. Stat. U. C. c. 73, s. 16.

such devise or bequest of any right he may have acquired as tenant by the curtesy."

This statute does not in any way affect the rights of a married woman to execute a will in pursuance of a power.

4. *Decrees.*

Where a decree of the Court of Chancery forms a link in the chain of title, it is the duty of the purchaser's solicitor to look through the whole of the decrees and other proceedings in Chancery to ascertain that nothing contained in them will affect his title.³

A purchaser will not be protected by a decree obtained in an imperfect suit, such a decree not being binding as to persons not parties to the suit, and whose rights are affected by it.⁴ A party purchasing under a decree of the Court is bound to see that the sale is made according to the decree;⁵ and all the proceedings in the cause ought to be produced and inspected by the purchaser.⁶ The Court though it may direct the sale of the property never undertakes to warrant the title, and it is quite possible for a purchaser to be evicted, although the sale is made by an order of the Court, and although the title has passed through the Master's Office⁷.

The only mode in which a purchaser can obtain a more perfect title on a sale under a decree, than under an ordinary contract for purchase is by obtaining a deed from the Court under the Act for Quieting Titles.⁸

If a purchaser takes a title to an estate sold under a

3. Lee on Abs. 317.

4. Colclough v. Sterum, 3 Bligh, 186; Giffard v. Hart, 1 Sch. & Lef. 386.

5. Atkinson on Titles, 580.

6. Lee on Abs. 176.

7. Ibid.

8. 29 Vic. c. 25, s. 32.

decree, but not in conformity with the provisions of the decree, he will not be protected by it,⁹ sales under decrees being entitled to protection when they are conformable to the decree, not otherwise.¹

Mere irregularities in a decree are not, however, sufficient grounds for impeaching a sale made under it.

In *Bennett v. Hamill*,² Lord Redesdale said, "The purchaser has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties; and that it has on the investigation properly decreed a sale; then he is to see that this is a decree binding the parties claiming the estate, that is, to see that all proper parties to be bound are before the Court, and he has further to see that taking the conveyance he takes a title that cannot be impeached aliunde. He has no right to call upon the Court to protect him from a title not in issue in the cause, and no way affected by the decree, but if he gets a proper conveyance of the estate, so that no person whom the decree affects can invalidate his title although the decree may be erroneous, and, therefore, to be reversed, I think the title of the purchaser ought not to be invalidated. If we go beyond this, we shall introduce doubts on sales under the authority of the Court which would be highly mischievous."

In *Dickey v. Heron*,³ where a motion was made by the defendant to open biddings or set aside a sale, on the grounds that the report of the amount due by the defendant was not filed until after the day appointed for payment, and that the sale under the decree had not in fact been advertised as directed by the Master although stated in the report on sale to have been so, it was held that the first objection had been waived by delay and

⁹ *Colclough v. Sterum*, 8 Bligh, 189.

¹ *Atkinson on Titles*, 561.

² 2 Sch. & Lef. 577.

³ 1 Chan. Cham. R. 149.

that the second did not affect the purchasers: V. C. Spragge saying, "I think a stranger purchasing is not affected by proceedings in the suit further than this, that he must see that there is a decree or order authorizing the sale that is made."

In another case⁴ where a bill was filed to impeach a sale made under a decree Lord St. Leonard said,—“If I found a purchaser buying, where fraud appeared clearly on the face of the decree, I should hold him to have notice of it: but I should have much hesitation in visiting a purchaser with the consequences of what might be deemed implied notice of a fraud, which was not discovered by the Court, or the officers of the Court, or the counsel concerned in the cause, whose duty it is not to permit the Court to make a decree not warranted by the facts of the case.”

Where the title is derived, not under a decree for sale, but under a decree and final order of foreclosure, the same rule seems to apply.

In the recent case of *Gunn v. Doble*,⁵ where a bill was filed by a mortgagor against a purchaser from the mortgagee after a final order of foreclosure, several objections were taken to the regularity of the proceedings in the foreclosure suit. It was objected, among other things, that in the bill and all the subsequent proceedings the plaintiff was improperly named as “Annie Louisa Rail,” her proper name being “Annie Louisa Rait;” that a person to whom the defendant conveyed *pendente lite* should have been made a party; and that the report finding the amount due and appointing a day for payment, though dated on the 13th of March, was not in fact signed till the 18th of April. All the objections raised were overruled by V. C. Spragge,

4. *Bowen v. Evans*, 1 J. & L. 257.

5. 15 Grant, 655.

although the learned Vice Chancellor expressed his disapprobation of the ante-dating of the report, remarking, "If the question were between the original parties it would be at least doubtful if the mortgagee could have held her final order of foreclosure; the question is whether Doble, purchasing under the circumstances that he did, can be affected by the irregularity."

After commenting upon the authorities (all of which have been already quoted) the learned Vice Chancellor said, "The observations of the learned Judges, whose language I have quoted, occurred in cases of sales under decrees; but I apprehend that they did not mean to hold purchasers under decrees not bound to look at the proceedings before decree, merely on the ground that to require more would have a tendency to damp the sales of the Court; in other words, that it would not be expedient to require more; but that, while pointing out the injurious effect that the requiring more would have upon sales, they held as a matter of principle, that parties acquiring rights under decrees, not being themselves parties to the suit could not be held bound to see whether the proceedings by which the decree was arrived at were correct and regular; including in the word decree any decretal or other order by which the rights of the parties were disposed of; and which would comprehend a final order of foreclosure, and, as the form is in Ireland, of foreclosure and sale. If a purchaser at a sale by the Court 'has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties, and that it has on that investigation properly decreed a sale' it does appear to me, upon principle, that a purchaser from a party in whose favour the Court has decreed final foreclosure has the like right to presume that the Court has taken the like steps, and has upon investigation properly decreed final foreclosure. Again to refer to the language

of Lord St. Leonards, while there would be no wrong, in holding a purchaser bound by what appears upon the face of a decree or other order which may be said to constitute a link in his chain of title, it would be quite another thing to hold him bound to look into that which was not discovered by the Court; which the Court had passed as correct and regular, and upon which the Court had founded its decree or order."

A decree of foreclosure against an infant defendant should give the infant a day to show cause after attaining twenty-one:⁶ and if followed by a final order, the order must also reserve a day to shew cause. But where the decree was made against the ancestor of the infant in his lifetime, and the suit is afterwards revived against the infant, no reservation by the final order of a day to show cause is necessary.⁷

Until notice of the decree is served upon the infant, after he attains twenty-one, the decree is not absolute; the only cause, however, which the infant can shew, is error in the decree.

In cases where, on account of the defendant not having been served personally with the bill, the decree is not absolute for three years,⁸ it does not become absolute by effluxion of time merely, an order making it absolute must be obtained from the Court.

In suits for partition or sale the decree of the Court is "as⁹ effectual for the apportionment or conveying away of the estate or interest of any married woman, infant, or lunatic, party to the proceedings by which the sale or partition is made or declared, as if any person compe-

6. *Mair v. Kerr*, 2 Grant, 228.

7. *Sutherland v. Dickson*, 2 Chan. Cham. R. 25.

8. Chan. Con. Ord. 113, 114, 115, 116; Taylor's Chan. Ord. 179, 180, 181.

9. Con. Stat. U. C. c. 12, s. 47.

tent to act for himself," and no day to show cause need be reserved.

5. *Vesting Orders.*

In every case in which the Court of Chancery has authority to order the execution of a deed, conveyance, transfer or assignment of any property, real or personal, the Court may, instead of ordering the execution of a conveyance, "make¹ an order vesting such real or personal estate in such person or persons, and in such manner, and for such estates, as would be done by any such deed, conveyance, assignment or transfer, if executed; and thereupon the order or decree shall have the same effect both at law and in equity as if the legal or other estate or interest in the property had been actually conveyed, by deed or otherwise, for the same estate or interest to the person in whom the same is so ordered to be vested, or in the case of a chose in action, as if such chose in action had been actually assigned to such last mentioned person."

Where a title is derived under a vesting order, the purchaser is entitled to call for evidence that the persons whose interest were intended to be assigned or conveyed by the order, were alive when it was made.²

It is doubtful whether the Court can, under this Act, make a valid vesting order transferring the estate of a married woman.

In *Clark v. McGregor*,³ a decree vesting the estate of a married woman was made by V. C. Mowat, but in *Field v. Moore*,⁴ the Master of the Rolls said, "I am not aware of any principle which would enable this Court to bind the real estate of a married woman, in any

1. Con. Stat. U. C. c. 12, s. 63.

2. *Slater v. Fiskin*, 1 Chan. Cham. R. 1.

3. MS. 29th April, 1867.

4. 19 Beav. 195.

manner except by those formalities which are required by law."

Under the Imp. Acts 13 & 14 Vic. c. 60, and the 15 & 16 Vic. c. 55, which are in force in this Province,⁵ in the several cases of a lunatic, or person of unsound mind, or infant being seised or possessed of any land upon any trust, or by way of mortgage, or entitled to any contingent right in any lands upon trust or by way of mortgage;

Or, of any person, solely or jointly with any other person or persons seised or possessed of any lands upon any trust or entitled to a contingent right in any lands upon any trust, being out of the jurisdiction, or not to be found;

Or, of its being uncertain which of several persons jointly seised or possessed of any lands upon any trust was the survivor;

Or, (where one or more person or persons shall have been seised or possessed of any lands upon any trust) of its not being known whether the trustee last known to have been seised or possessed be living or dead;

Or, of any person seised of any lands upon any trust having died intestate as to such lands, without an heir, or having died and its not being known who is his heir or devisee;

Or, of lands being subject to a contingent right in any unborn person or class of persons, who, upon coming into existence, would, in respect thereof, become seised or possessed of such lands upon any trust;

Or, of a person jointly or solely seised or possessed of any lands, or entitled to a contingent right therein upon any trust being demanded by a person entitled to require a conveyance, assignment, or release of the same respectively, or his agent, to convey, release or assign the

5. Con. Stat. U. C. c. 12, s. 26, sub. sec. 10; Re Lash, 1 Chan. Cham. R. 226.

same, but wilfully refusing or neglecting to convey or assign the said lands for the space of twenty-eight days next after such demand ;

The Court of Chancery is enabled to make an order vesting such lands in such person or persons in such manner and for such estate, or releasing the lands subject to such contingent right therefrom, or disposing of the same, as the Court shall direct ; and the order is in itself to operate as an assurance.

And where any mortgagee shall have died without having entered into the possession or into the receipt of the rents and profits of the mortgaged lands, and the money due in respect of the mortgage shall have been paid to a person entitled to receive the same, or such last mentioned person shall consent to an order for the reconveyance of such lands, the Court may make an order vesting such lands in such person or persons, in such manner, and for such estate as the Court shall direct in case an heir or devisee of such mortgagee shall be out of the jurisdiction or cannot be found ;

Or, an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such lands, or his agent, have stated in writing that he will not convey the same, or shall not convey the same, for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered to him by a person entitled as aforesaid, or his agent ;

Or, it shall be uncertain which of several devisees of such mortgagee was the survivor ;

Or, it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee, whether he be living or dead ;

Or, such mortgagee shall have died intestate as to such lands, and without an heir, or shall have died, and it shall not be known who is the heir or devisee ; and the order is itself to have the effect of an assurance.

Instead of making a vesting or releasing order, the Court may, in every case, appoint a person to make a conveyance, assignment, release or disposition of the lands or contingent interest which, when duly made, is to have the effect of a vesting or releasing order.

Under these provisions the Court may vest the legal estate, subject to redemption, in the executor of a deceased mortgagee, or in the administrator of a mortgagee in fee, who has died intestate,⁶ whose heir is unknown, the debt remaining unpaid;⁷ though at first the opposite was held.

6. *Acts of Parliament.*

Most private Acts of Parliament in this Province, contain a clause declaring that they shall be deemed public acts, and be judicially noticed without being specially pleaded; and that a copy printed, or purporting to be printed by the Queen's Printer shall be received as evidence.

The clause declaring the act to be a public act, does not render a copy of the act good evidence except as between the parties; against strangers it is inadmissible.⁸ Lord Tenterden, in the case cited, held that the clause only applied to the form of pleading, and did not vary the general nature and operation of the act.

Where there is a clause declaring a copy of the act printed by the Queen's Printer to be evidence, the production of a copy purporting to be so printed is sufficient;⁹ but if the act contains no such clause, then, it must be proved by a copy examined with the original.¹

By the interpretation acts both of the Dominion of

6. *Re Boden*, 1 D. M. & G. 57.

7. *Re Meyrick*, 9 Ha. 116.

8. *Brett v. Beales*, 1 Mood & M. 425.

9. *Dart on Vendors*, 204; 1 Byth. 169.

1. *Cov. Con. Ev.* 81; *Dart on Vendors*, 205; *Lee on Abs.* 321.

Canada,² and Province of Ontario,³ "Every act shall, unless by express provision it is declared to be a private act, be deemed to be a public act, and shall be judicially noticed by all Judges, Justices of the Peace, and others, without being specially pleaded—and all copies of acts, public or private, printed by the Queen's Printer shall be evidence of such acts and of their contents; and every copy purporting to be printed by the Queen's Printer shall be deemed to be so printed."

A public act of Parliament is notice to all mankind, but a private act, or a private act made public, is not of itself notice to a purchaser.⁴ The only object of the proviso for making it a public act being, that it may be judicially taken notice of without being specially pleaded, and to save the expense of proving it by an attested copy.⁵

Where a sale is made in pursuance of an Act of Parliament, the provisions of the act must be followed strictly; the exercise of powers conferred by an Act of Parliament receiving like the exercise of other powers a strict construction, consequently the evidence necessary to show that all the forms have been complied with, becomes a necessary part of the title.⁶

But if a Court having jurisdiction, improperly decides, in carrying into effect a special Act of Parliament, as to debts or claims on the estate, such errors will not affect a purchaser.⁷

Recitals in private acts require the same authentica-

2. 31 Vic. c. 1, s. 7, sub. sec. 38.

3. Ont. Stat. 31 Vic. c. 1, s. 7, sub. sec. 38.

4. Sug. V. & P. 758; Dart on Vendors, 504.

5. Hope v. Stevenson, 3 Bos. & P. 578.

6. Sug. V. & P. 111; Atkinson on Titles, 558.

7. Sug. V. & P. 111, 112.



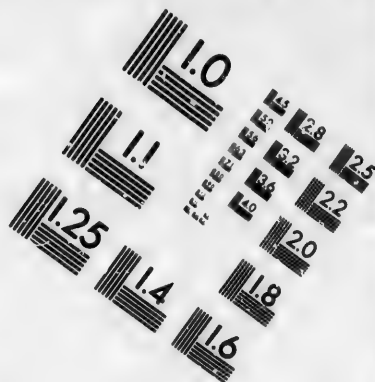
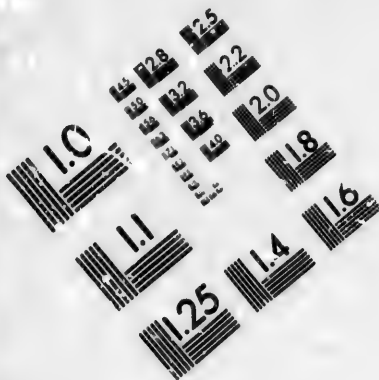
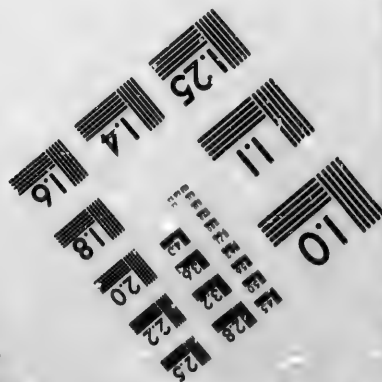
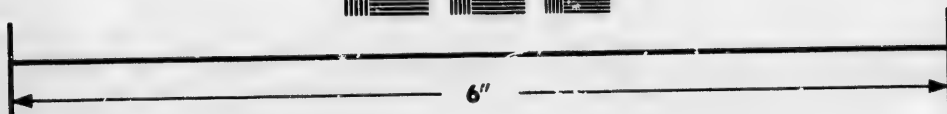
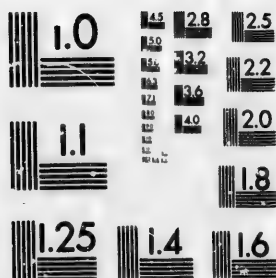


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tion as averments in ordinary deeds, the act itself being nothing more than a private assurance.⁸

7. *By-Laws.*

Under the Municipal Act⁹ the Councils of every Township, County, City, Town and Incorporated Village may pass By-laws, "for selling the original road allowance to the parties next adjoining whose lands the same is situated, when a public road has been opened in lieu of the original road allowance, and for the site or line of which compensation has been paid, and for selling in like manner to the owners of any adjoining land any road legally stopped up or altered by the Council; and in case such parties respectively refuse to become the purchasers at such price as the Council thinks reasonable, then for the sale thereof to any other person for the same or a greater price."

No such By-law is to be passed,¹ "until written or printed notices of the intended By-law have been posted up one month previously in six of the most public places in the immediate neighbourhood of the original allowance for road; and published weekly for at least four successive weeks in some newspaper (if any there be) published in the municipality; or if there be no such newspaper, then in a newspaper published in some neighbouring municipality; nor until the Council has heard, in person or by counsel or attorney, any one who may be prejudicially affected thereby, and who petitions to be so heard."

County Councils may also make By-laws,² "for stopping up, or stopping up and sale, of any original allowance for road or parts thereof within the County, which

8. Cov. Con. Ev. 81.

9. Con. Stat. U. C. c. 54, s. 331, sub. sec. 6; 29 & 30 Vic. c. 51, s. 333, sub. sec. 6.

1. Con. Stat. U. C. c. 54, s. 321; 29 & 30 Vic. c. 51, s. 323.

2. Con. Stat. U. C. c. 54, s. 342, sub. sec. 1; 29 & 30 Vic. c. 51, sec. 344, sub. sec. 1.

is subject to the sole jurisdiction and control of the Council and not being within the limits of any Village Town or City within or adjoining the County."

Township Councils³ may pass similar by-laws, but in both cases the same requirements as are pointed out above are necessary to the validity of the by-law; and in the case of Township Councils⁴ it is further necessary that the by-law be confirmed by a by-law of the Council of the County in which the Township is situate, at an ordinary session of the County Council, not sooner than three months, nor later than one year next after the passing thereof.

If the trustees of any police village,⁵ or fifteen of the inhabitant householders of any unincorporated village or hamlet, consisting of not less than twenty dwelling houses, standing within an area of two hundred acres petition the Council of the Township in which it is situate, and in case it is not a police village, if such petition is accompanied by a certificate from the County Registrar that a plan of the village has been duly deposited in his office, the Council may pass a by-law to stop up, sell and convey, or otherwise deal with any original allowance for road lying within the limits of the village or hamlet, as laid down on the plan, but such by-law is to be made subject to the provisions as to sale of road allowances.

In case⁶ any one in possession of a concession road or side line has laid out and opened a road or street in place thereof without receiving compensation therefor, or in case a new or travelled public road has been laid out and opened in lieu of an original allowance

3. Con. Stat. U. C. c. 54, s. 343, sub. sec. 2; 29 & 30 Vic. c. 51, s. 345, sub. sec. 2.

4. Ibid.

5. Con. Stat. U. C. c. 54, s. 344; 29 & 30 Vic. c. 51, s. 346.

6. Con. Stat. U. C. c. 54, s. 352; 29 & 30 Vic. c. 51, s. 354.

for road, and for which no compensation has been paid to the owner of the land appropriated as a public road in place of such original allowance, the owner, if his lands adjoin the concession road, side line or original allowance, shall be entitled thereto in lieu of the road so laid out, and the Council of the Municipality upon the report in writing of its Surveyor or of a Deputy Provincial Land Surveyor that such new or travelled road is sufficient for the purposes of a public highway, may convey the said original allowance for road in fee simple to the person or persons upon whose land the new road runs, and when any such road allowance is, in the opinion of the Council, useless to the public, and lies between lands owned by different parties, the Municipal Council may, subject to the conditions aforesaid, sell and convey a part thereof to each of such parties as may seem just and reasonable; and in case compensation was not paid for the new road, and the person through whose land the same passes does not own the land adjoining the original road allowance, the amount received from the purchaser of the corresponding part of the road allowance when sold shall be paid to the person who at the time of the sale owns the land through which the new road passes.

Under the recent Municipal Act,⁷ Township Councils may purchase from the government or any corporation or person all the wet lands at the disposal of the Crown or such corporation or person in any such Township, and the Council may possess and hold the land so purchased, and may, whenever they deem it expedient, sell or otherwise depart with or dispose of the same by public auction in like manner as they may by law sell or dispose of other property, and upon such terms and conditions, and with such mortgages upon the land so sold,

7. 29 & 30 Vic. c. 51, s. 345, sub. sec. 5.

or other security for the purchase money or any portion thereof, as they may think most advantageous.

To the titles derived under such by-laws the observations made on titles under Acts of Parliament apply ; all the provisions of the acts must be complied with and strictly followed.

8. *Powers of Sale.*

On investigating a title depending upon the due exercise of a power of sale contained in a mortgage, it is important to observe under what terms the power or trust is to arise ; in what manner it is to be exercised ; and particularly whether any notice is required to be given to the mortgagor prior to the sale ; and if so, whether proper notice has been given according to the terms of the deed.⁸

A power, in a mortgage deed, to the mortgagee to sell, is in the nature of a trust, but it may be exercised without the concurrence of the mortgagor.⁹ The mortgagee like every other trustee is bound to use all the means in his power to get the fairest and best price for the property.¹

Where the power of sale is general, a mortgagee may accept a fair offer by private contract, without first advertising the estate, and he is not bound to wait upon speculation for a better bidding, or to put up the estate by auction, and although the purchaser is bound to see that the sale is authorized by the power, he is not bound to enquire what steps have been antecedently taken for the purpose of promoting the sale.²

8. Lee on Abs. 141.

9. Sug. V. & P. 65.

1. Orme v. Wright, 3 Jur. 19 ; Richmond v. Evans, 3 Grant, 508 ; Latch v. Forlong, 12 Grant, 303.

2. Davey v. Durrant, 1 DeG & J. 535.

The mortgagor cannot purchase under the power so as to relieve himself from subsequent charges made by him before the sale;³ and perhaps the rule would be the same if the estate was sold to a stranger and purchased from him by the mortgagor.⁴

The mortgagee cannot, by a pretended sale, acquire the property as his own; relief from such a sale would be afforded even at a considerable distance of time.⁵

If the mortgage is silent as to notice being given to the mortgagor, prior to the sale, it has been held that notice should be given if the power to sell is vested not in the mortgagee, but in some third person as a trustee; but if the mortgagor has entrusted the mortgagee with the power of selling, no notice is requisite unless provided for by the deed.⁶

Where notice is required to be given, the power in this respect, as in all others, must be closely followed.

In every case, whether notice is required to be given by the power or not, it is a prudent course to give notice to subsequent incumbrancers who are entitled to redeem the mortgage.

9. Tax Titles.

Many titles in this Province depend upon the regularity of tax sales, and wherever a Sheriff's deed on a sale for taxes forms a link in a title, it should be subjected to close scrutiny.

The irregularities in connection with tax sales have been so great that it may almost be said here as it has been in the United States,⁷ that "a tax deed is *prima facie* void."

3. Otter v. Lord Vaux, 2 K. & J. 650; 6 D. M. & G. 633.

4. Sug. V. & P. 66; and see McDonald v. Reynolds, 14 Grant, 691.

5. Robertson v. Norris, 1 Giff. 421; Popham v. Exham, 10 Ir. Ch. R. 440.

6. Anon, 6 Mad. 10; Lee on Abs. 141.

7. Blackwell on Tax Titles, 35.

Since 1793, the acts relating to the assessment of property and levying taxes thereon have been numerous, have followed each other in such rapid succession, and have been so varied in their provisions, that the law relating to such matters is in an exceedingly unsatisfactory state.⁸

Under the earlier acts,⁹ the only remedy provided for levying taxes upon default in payment, was by distress and sale of the defaulter's goods and chattels. The 51 Geo. 3, c. 8, passed in 1811, provided,¹ that all lands held in fee simple, by Land Board certificate, Order of Council, or certificate of a Governor of Canada should be considered rateable property; that the amount levied should not in any one year exceed one penny in the pound;² and that in default of payment the amount should be levied by distress and sale of the defaulter's goods and chattels.³

With the exception of an act⁴ passed in 1798, which permitted the Justices of the Peace of a District in Quarter Sessions assembled to levy a rate for establishing stone monuments at Township boundaries, and to sell lands for default in payment, the first act authorizing the sale of lands for arrears of taxes was the 6 Geo. 4, c. 7, passed in 1825.

(a) *Surveyor General's Return.*

The Act passed in 1819⁵ followed the 51 Geo. 3, c. 8,

8. 38 Geo. 3, c. 3; 43 Geo. 3, c. 12; 47 Geo. 3, c. 7; 51 Geo. 3, c. 8; 55 Geo. 3, c. 5; 59 Geo. 3, c. 7; 59 Geo. 3, c. 8; 6 Geo. 4, c. 7; 9 Geo. 4, c. 3; 7 Wm. 4, c. 19; 1 Vic. c. 20; 4 & 5 Vic. c. 10; 13 & 14 Vic. c. 67; 16 Vic. c. 182; 16 Vic. c. 183; 27 Vic. c. 19; 29 & 30 Vic. c. 68; Ont. Stat. 32 Vic. c. 36.

9. 38 Geo. 3, c. 3; 43 Geo. 3, c. 12; 47 Geo. 3, c. 7; 51 Geo. 3, c. 8.

1. Sec. 4.

2. Sec. 6.

3. Sec. 8.

4. 38 Geo. 3, c. 1.

5. 59 Geo. 3, c. 7.

as to the lands liable to taxation, and to enable the municipal officers to impose an equal rate, and to inform them with certainty as to the proper lands chargeable therewith, the Surveyor General was required,⁶ on or before the 1st day of July, 1820, to furnish the Treasurer of each district with a list or schedule of the lots in every town, township, or reputed township of the district, as the same were designated by numbers, concessions, or otherwise, on the original plan, specifying to whom the lot, or any and what part of it had been described as granted by His Majesty, and whether the same or any and what part thereof was ungranted, and also what lots were reserved as Crown or Clergy Reserves, or for other public purposes, and to whom such reserve or any part thereof had been leased; and he was also, on or before the 1st day of July in each and every year thereafter, to transmit a list of all lots or parcels of land, specifying the quantity granted or leased, since the last list furnished by him; and⁷ all the lands included in such list as granted or leased were liable to taxation whether occupied or not.

By the 13 & 14 Vic. c. 67, passed in 1850, the return⁸ was to be made by the Commissioner of Crown Lands within thirty days after the first day of January in each and every year; and by the 16 Vic. c. 182, s. 48 the return was to include all lands in respect of which a license of occupation had issued during the preceding year.

By the 27 Vic. c. 19, passed in 1863,⁹ unpatented lands vested in or held by Her Majesty, thereafter sold or agreed to be sold, or located as a free grant, were

6. Sec. 12.

7. Sec. 18.

8. Sec. 33.

9. Sec. 9.

made subject to taxation from the date of the grant, and all lots formerly granted were made liable to taxation from the 1st of January, 1863.

The return of the Surveyor General or Commissioner of Crown Lands is the foundation of the whole proceeding for taxation of lands,¹ as no lands can be assessed which are not included in the schedule;² and it forms the basis on which the County Treasurer had formerly to keep an account for every parish, town, township, reputed township, or place within his district according to the list or schedule furnished by the Surveyor General, in which account he was to enumerate particularly every lot or parcel of land in each township, reputed township, or place, according to the schedule, and charge or credit it for the amount of the taxes and rates payable or paid in respect of it for each and every year;³ and from which he is now to furnish to the clerk of each local municipality the information necessary for the guidance of the assessors as to what lands are liable to be assessed.⁴

Before the statute required the return to be made in January, it was held that land returned in June for assessment, was liable for the taxes for the whole of the current year.⁵

Land held by a Crown Land Agent's receipt and not by patent, lease, or license of occupation, and not occupied, was not, before the 1st of January, 1863, liable to assessment, though returned by the Commissioner of Crown Lands under 16 Vic. c. 182, s. 43, as land to be assessed.⁶

1. Doe d. Upper v. Edwards, 5 Q. B. U. C. 598.

2. Peck v. Monro, 4 C. P. U. C. 363.

3. 59 Geo. 3, 7, s. 14; Peck v. Monro, 4 C. P. U. C. 363.

4. 13 & 14 Vic. c. 67, s. 39; 16 Vic. c. 182, s. 43; Con. Stat. U. C. c. 55, s. 109; 29 & 30 Vic. c. 53, s. 110; Ont. Stat. 32 Vic. c. 36, s. 109.

5. Doe d. Stata, v. Smith, 9 Q. B. U. C. 658.

6. Street v. Kent, 11 C. P. U. C. 255; Street v. Simcoe, 12 C. P. U. C. 234; Street v. Lambton, 12 C. P. U. C. 294.

(b) Assessment.

A question has been raised, what is the assessment, and by whom and when is it made?

In *Laughtenborough v. McLean*,⁷ the Court of Common Pleas decided, that "the assessment is the rating which is made upon the assessment roll by the assessor, and that it is completed when the roll is finally passed. If this be so, then it follows that the entry as made upon that roll is the assessment which is to govern, and that all the other copies and entries ought to correspond with the primary roll and are only copies of and entries from it."

The 59 Geo. 3, c. 7, required⁸ the Treasurer to keep an account with each lot or parcel of land and charge or credit it for the amount of the taxes and rates payable or paid in respect of it for each and every year.

Where⁹ the rates and assessments upon any lot of land remained in arrear and unpaid for the space of three years they were to be increased in the proportion of one third; if in arrear five years, then they were to be increased one half, and if suffered to remain in arrear for eight years, the amount of the arrears was to be doubled and the rates were thenceforth to be charged against the lands by the Treasurer, and levied in double the amount that would grow due according to the existing rate or assessment.

In 1828, it was enacted,¹ that no greater accumulation than fifty per cent. should be charged upon any lands on which the taxes should be paid before the 1st of July, 1829; and thereafter fifty per cent. and no more was to

7. 14 C. P. U. C. 175.

8. Sec. 14.

9. Sec. 15.

1. 9 Geo. 4, c. 3, s. 4.

be charged in all cases in which the taxes remained in arrear longer than five years.

By the 13 & 14 Vic. c. 67, taxes accrued on any land were made² a special lien on the land, having a preference over any claim, lien or incumbrance of any party except the Crown, and one which does not require registration to preserve it, and which bears interest from the time the taxes become due, which interest is to be deemed part of the taxes.

The 16 Vic. c. 182, required³ the Treasurer, on the 1st of May in each year, to complete and balance his books by entering against each parcel of land, the arrears, if any, due at the last settlement, and the taxes of the preceding year which may remain unpaid. If at the making of such balance it appeared that any arrear of taxes was due upon any parcel of land, the Treasurer was to add to the whole amount then due, ten per cent. thereon.⁴ This was reduced to eight per cent.⁵ in 1866, and again raised to ten per cent. in 1868.⁶

The ten per cent. on arrears of taxes was calculated on the whole amount in arrear and due upon the land, and not merely on the amount of each year's assessment.

In *Gillespie v. The City of Hamilton*,⁷ the question was raised whether the ten per cent. authorized to be charged upon arrears of taxes, should be added to the amounts in arrear in each year, including the previous additions of ten per cent., or simply on the amount of taxes then in arrear, and it was held that it should be added to the whole amount. Draper, C. J., in delivering judgment said, "I think the Legislature have used

² Sec. 86.

³ Sec. 51; Con. Stat. U. C. c. 55, s. 115.

⁴ 16 Vic. c. 182, s. 58; Con. Stat. U. C. c. 55, s. 121.

⁵ 29 & 30 Vic. c. 53, s. 126.

⁶ Ont. Stat. 32 Vic. c. 86, s. 125.

⁷ 12 C. P. U. C. 426.

language very clearly indicating an intention that ten per cent. should be added every year, calculated on the whole amount which is in arrear and due upon the lands at the time the charge is made. In the present case the lands were liable to satisfy a given sum on the 1st of May, 1862, which sum included taxes for preceding years, and ten per cent. added thereto at the preceding first of May. To that sum which constituted the whole amount due on the lands, the statute, as I read it, directs that ten per cent. should be added."

By the earlier acts the amount of taxes which could be charged in one year was limited. *

The 51 Geo. 3, c. 8, s. 6, provided that the sum levied should not exceed, in any one year, one penny in the pound.

By the 59 Geo. 3, c. 7, the Justices of the Peace in Quarter Sessions were⁸ not to raise more money than was required for defraying the public expenses of the District and this was to be apportioned among those "who were named in the rate roll;" which did not include the non-residents.

Where the Quarter Sessions did not assess certain lands, but the Treasurer left blank columns in his books for certain years, and charged of his own authority, at indefinite times, the maximum charge of one penny in the pound, under the idea that the statute had imposed that sum, which was generally known as the wild land tax, on all lands, a sale for the arrears of such taxes was held void.⁹

The 59 Geo. 3, c. 8, enacted,¹ that all unoccupied lots of land should be rated one eighth of a penny per acre annually towards defraying the expense of making and

8. Sec. 7.

9. *Cotter v. Sutherland*, 13 C. P. U. C. 402.

1. Sec. 3.

maintaining roads, and in the case just cited, the sale although made to satisfy such rate also, was held void, because illegal rates were included in the amount for which the land was sold.

By the 4 & 5 Vic. c. 10, s. 41; the amount which could be raised by assessment was made two pence in the pound, and for district purposes one penny half penny in the pound.

An assessment under this act of so much per acre, instead of on the assessed value, has been held illegal.²

Where the Surveyor General returned a tract of land as a single lot, it has been held that it must be assessed as one lot, though half of it may be in one concession and half of it in another,³ and where several lots are included in one grant, but described by separate numbers, a portion of each lot must be sold to pay the taxes due upon such lot, and not a portion of the whole block, beginning at the boundary from which the lots are numbered, for the taxes due upon the whole.⁴

(c) Treasurer's Return of Lands in Arrear.

By the 6 Geo. 4, c. 7, passed in 1825, provision was made "for levying under certain restrictions, the assessments which may remain in arrear, by the sale of a portion of the lands on which the same may be charged."

That act provided⁵ that the Treasurer of each District should at the next Quarter Sessions after the 1st of July 1828, present to the Justices in Quarter Sessions an accurate account of all lands in the district upon which the assessment or any part thereof was in arrear for the space of eight years, specifying the lot or parcel of land

2. Doe d. McGill v. Langton, 9 Q. B. U. C. 91; Williams v. Taylor, 13 C. P. U. C. 219.

3. Doe d. Upper v. Edwards, 5 Q. B. U. C. 594.

4. Munro v. Gray, 12 Q. B. U. C. 647; McDonald v. Robillard, 23 Q. B. U. C. 105; Riddout v. Ketchum, 5 C. P. U. C. 50; Black v. Harrington, 12 Gr 175; Christie v. Johnston, *Ibid.*, 534.

5. Sec. 6.

by number, concession and township, or otherwise, as the same appeared in the schedule furnished to the Treasurer, and also⁶ the amount due for assessment thereon; and should also at the Quarter Sessions next after the 1st of July in each year thereafter furnish a like account.

The Treasurer was also,⁷ within one month after rendering his account, to insert in the Upper Canada Gazette, and in some public newspaper in the district, a list of all the lots returned by him in his account, as liable to sale, and if no newspaper was published in the district, he was, within the same time, to affix a list in some conspicuous place in each township.

By the 13 & 14 Vic. c. 67, passed in 1850, the Collector, if any taxes remained unpaid, was required,⁸ when returning his roll, to deliver an account of all the taxes remaining due, showing opposite each separate assessment the reason why he did not collect the same, by inserting "non-resident," or, "property to distrein," to make oath that the sums mentioned in the account remained unpaid, and that he had not by diligent enquiry been able to discover any goods or chattels upon which he could levy; and such account was made sufficient authority for the Treasurer to proceed to sell the lands.

The Treasurer was thereupon⁹ to enter in a book kept for the purpose, a copy of the roll so far as it related to the lands of non-residents together with the taxes charged upon such lands; and he was within one month after receipt of the roll to address a circular letter through the post to the owners of the several lots stating the amount due, and calling for payment, and if he was unable to satisfy himself as to the owner of any lot or where he

6. Sec. 6.

7. Sec. 9.

8. Sec. 43.

9. Sec. 43, 44.

resided, he was to put in the Official Gazette a list of the lands setting forth the total amount due on each lot, and calling for payment; charging to the land the expense of publication.

The act also required¹ the Treasurers of Counties, on or before the 1st of January, 1851, to make out and submit to the Municipal Council of the County a list of the lands in their respective counties on which any taxes remained unpaid, stating the number of acres in each lot or part lot, the number of years for which it was in arrear for taxes and the amount of taxes due, together with the names of the owners so far as such Treasurer had been able to ascertain them and the amount of such arrears were to be added to the assessment roll for 1851.

The 16 Vic. c. 182, s. 47 required a similar return of lands on which the Collector had been unable to collect the taxes, to be made to the Township Treasurer and it was made² the duty of the latter officer to return a correct copy of the roll to the County Treasurer.

By this act³ the necessity for a return to the County Council of lands in arrear for taxes, as a preliminary to their sale, seems to have been done away with, and the Treasurer was empowered whenever a portion of the taxes had been due on any lot for five years, to issue a warrant for sale by the Sheriff, but the Council could direct that no warrant should issue until some portion of the arrears were due for a period longer than five years.

This course continued to be pursued until 1865, when the 29 & 30 Vic. c. 53, which substituted the County Treasurer for the Sheriff as the officer to sell lands for arrears of taxes was passed. This act requires⁴ the Trea-

1. Sec. 46.

2. Sec. 49.

3. Sec. 55; Con. Stat. U. C. c. 55, ss. 122, 124.

4. Sec. 120.

suror to submit to the Warden a list in duplicate of all lands liable to be sold for taxes with the amount of arrears against each lot set opposite the same. To each of these lots it is made the duty of the Warden to affix the seal of the Corporation and his signature, and one of them is to be deposited with the Clerk of the County, and the other returned to the Treasurer with a warrant annexed under the hand of the Warden and seal of the County, commanding him to levy the arrears.

In an ejectment suit by a purchaser of land sold for taxes under 6 Geo. 4, c. 7, it has been held⁵ necessary to prove that a return was made of the land having been the proper time in arrear for taxes, and that the writ to sell was grounded on this return.

The books of the Treasurer showing the land to be in arrear, are sufficient proof of the fact of arrear, but it has been doubted whether the warrant to sell would be so;⁶ and that the taxes were in fact in arrear for the proper time.⁷

An extract from the Treasurer's books showing the taxes to be unpaid, is not sufficient evidence of the fact.⁸

(d) *Writ to Sell.*

By the 6 Geo. 4, c. 7, upon the Treasurer⁹ laying before the Quarter Sessions the list of lands in arrear for taxes, it was made¹ the duty of the Clerk of the Peace in each district to make out a warrant for levying the assessment due, specifying in the writ the particular lot

5. *Doe d. Bell v. Beaumont*, 3 Q. B. O. S. 243.

6. *Hall v. Hill*, 22 Q. B. U. C. 578; 2 Ex. & Ap. 569.

7. *Doe d. Upper v. Edwards*, 5 Q. B. U. C. 594; *Doe d. Sherwood, v. Matheson*, 1 Q. B. U. C. 321; *Harbourn v. Boushey*, 7 C. P. U. C. 464; *Errington v. Dumble*, 8 C. P. U. C. 65; *Allan v. Fisher*, 18 C. P. U. C. 63; *Myers v. Brown*, 17 C. P. U. C. 307; *Jones v. Bank of Upper Canada*, 18 Gr. 74.

8. *Munro v. Grey*, 12 Q. B. U. C. 647.

9. Sec. 6.

1. Sec. 7.

or parcel of land, and the amount due thereon, which warrant was to be signed and sealed by the Clerk of the Peace, directing the Sheriff of the district to levy the amount therein stated to be due, together with certain fees imposed by the Act, by sale of such portion of the lands and tenements upon which the assessments were chargeable, as should be sufficient for that purpose, provided there was no distress upon the lands from which the same could be made, and if there was such distress, then to levy the same by sale of the distress. This² writ was to be made returnable at the third Quarter Sessions after issuing the same, and the Sheriff was directed to have the moneys levied under the writ at the said Court.

The writ to sell continued to be issued by the Clerk of the Peace until 1850, when the 13 & 14 Vic. c. 67, enacted,³ that the County Treasurer should, within thirty days after the Collector made his return, issue a warrant under his hand and seal directed to the Sheriff of the County, commanding him to levy on the lands of non-residents for the amount of taxes remaining due thereon and his costs.

The 16 Vic. c. 182, s. 55, empowered the Treasurer to issue the warrant whenever a portion of the tax on any land had been due for five years, and this continues still to be the law.⁴

In the warrant, the Treasurer was required⁵ to distinguish such lands as had been patented from those which were under a lease or license of occupation, and of which the fee remained in the Crown, and this continued to be the case until 1866. The 29 & 30 Vic. c. 53, s. 129, contains no similar provision.

2. Sec. 8.

3. Sec. 48.

4. Con. Stat. U. C. c. 55, s. 124; 29 & 30 Vic. c. 53, s. 129; Ont. Stat. 32 Vic. c. 36, s.

5. 16 Vic. c. 182, s. 55; Con. Stat. U. C. c. 55, s. 125.

The writ to sell must be founded upon the Treasurer's return;⁶ and it must be under the seal as well as the signature of the proper officer, and if not sealed, all sales under it are void.⁷

A mistake in representing the taxes as due from the 1st of July, 1820, to the 1st of July, 1828, in place of from the 1st of January to the 1st of January of these years, has been held not important, the taxes being in fact due for the full period of eight years.⁸

A writ issued in 1837, and postponed by 1 Vic. c. 20, was held properly acted upon in 1839.⁹

The omission, since 1853, to distinguish, in the writ, whether the lands were patented or under lease or license of occupation, has been held fatal to it; and to a sale under it;¹ but describing the lands as "all patented" is sufficient.² Describing the lands to be sold, in a schedule which is incorporated with the warrant, so as to be a part of it, is sufficient.³ The writ should show the particular land that is to be sold; there being confusion and doubt in this respect will avoid the sale;⁴ but if the identity can be established it is sufficient.⁵

The writ can issue only after the full period is past for which the land can be sold.⁶

Where a new county is created, and taxes become due to it, and taxes are also and were due before the separation, the writ to sell goes to the Sheriff of the new county to sell for the arrears due both counties.⁷

6. Doe d. Bell v. Beaumore, 3 Q. B. O. S. 243; Errington v. Dumble, 3 C. P. U. C. 65.

7. Morgan v. Quesnel, 26 Q. B. U. C. 539.

8. Doe d. Stata v. Smith, 9 Q. B. U. C. 658.

9. Todd v. Werry, 15 Q. B. U. C. 614; Hamilton v. McDonald, 23 Q. B. U. C. 186.

1. Hall v. Hill, 22 Q. B. U. C. 578; S. C. 2 Ex. & App. 509.

2. Brooke v. Campbell, 12 Gr. 526.

3. Hall v. Hill, 22 Q. B. U. C. 578.

4. Townsend v. Elliott, 12 C. P. U. C. 217.

5. McDonell v. McDonald, 24 Q. B. U. C. 74.

6. Kelly v. Meeklem, 14 Grant, 29.

7. Doe d. Mountcashel v. Grover, 4 Q. B. U. C. 23.

(e) Distress.

In the case of sales under the earlier tax acts it is necessary to show that there was no sufficient distress on the premises.⁸

Under the 6 Geo. 4, c. 7, s. 7, the warrant to be issued by the Clerk of the Peace directed the Sheriff to levy the amount due, by sale of such portion of the land as should be sufficient for that purpose, provided there was no distress thereon from which the same could be made, and if there was such distress, then by sale of the distress.

The Sheriff was not obliged to look for a distress on the land between the time he first offered it for sale, and the time when an adjourned sale was had, and a distress in fact being upon the land between these two periods did not invalidate the sale.⁹ The old law as to the omission to distrain invalidating a sale seems to have been altered by the 13 & 14 Vic. c. 67.¹

The 16 Vic. c. 182, enacted² that it should be lawful for the Treasurer, whenever he should be satisfied that there was a distress upon the lands of non-residents in arrear for taxes, to issue a warrant under his hand and seal to the Sheriff, who should thereby be authorized to levy the amount due upon any goods and chattels found upon the land, in the same manner, and subject to the same restrictions, as referred to distress made by a Collector.³

The 58th section required the Sheriff, if at any time after the receipt of the warrant to sell, he had good rea-

8. *Doe d. Bell v. Beaumore*, 3 Q. B. O. S. 248; *Doe d. Upper v. Edwards* 5 Q. B. U. C. 594.

9. *Hamilton v. McDonald*, 25 Q. B. U. C. 136.

1. *Hamilton v. McDonald*, 25 Q. B. U. C. 136; *McDonell v. McDonald*, 24 Q. B. U. C. 74.

2. Sec. 54; see also *Con. Stat. U. C. c. 55, s. 122*.

3. Secs. 42, 43 and 44.

son to believe that there was a distress upon any parcel of land included therein, to levy the arrears of taxes and the costs by distress and sale of any goods and chattels found on the land. To this section a proviso was added that no subsequent sale of any such parcel of land by the Sheriff should be held illegal or invalid by reason of there having been any goods and chattels thereon before or at the time of the sale, and the Sheriff having neglected to levy the tax by the distress and sale of the same.

The 27 Vic. c. 19, passed in 1863, provided⁴ that the Treasurer and Sheriff should not be required to inquire before sale of lands for taxes whether there was any distress upon the lands, but the more recent statutes⁵ contain a provision as to the Treasurer similar to that contained in the 16 Vic. c. 182, s. 54, except that the warrant issued by the Treasurer is to be directed to the Collector of the local municipality instead of to the Sheriff.

It was not made the duty of the Treasurer to search for a distress on lands; but if satisfied that there was a distress, it would be necessary to allege and prove that he had notice of the distress.⁶

Even the neglect of a Collector whose duty it was to search for distress, has been held not to invalidate a sale subsequently made of the land for arrears which might in whole or in part have been satisfied by such distress.⁷ The old law was otherwise, especially if it could be shown that there was a sufficient distress upon the land at the time of the sale.⁸

(f) *Advertisement.*

The 6 Geo. 4, c. 7, required the Sheriff,⁹ within one

4. Sec. 4.

5. 29 & 30 Vic. c. 58, s. 127; Ont. Stat. 32 Vic. c. 30, s. 126.

6. *Foley v. Moodie*, 16 Q. B. U. C. 254.

7. *Allan v. Fisher*, 18 C. P. U. C. 68.

8. *Dobbie v. Tully*, 10 C. P. U. C. 432; but see *Doe d. Powell v. Rorison*, 2 Q. B. U. C. 201; *Doe d. Upper v. Edwards*, 5 Q. B. U. C. 504; *Stafford v. Williams*, 4 Q. B. U. C. 488; *Fraser v. Mattice*, 19 Q. B. U. C. 150.

9. Sec. 10.

month after receiving the writ, to insert in the Upper Canada Gazette, and in all the printed newspapers in the district, a notice of the time and place at which he would attend to sell the lands, and if no newspaper was published in the district, then the notice was to be affixed on the door of the Court House, and also in two or more places in each township.

By the 13 & 14 Vic. c. 67, the sale¹ was to be advertised once in each month for four successive months, in some newspaper of the County, if any such, and if none, then in a newspaper in an adjacent county, and the last insertion of the advertisement was required to be at least one week prior to the day of sale. The Sheriff was also required² to post a notice similar to the advertisement in some convenient and public place in the county, three weeks before the time of sale. These notices³ were to state the names of all owners known to the Sheriff, with the total amount of taxes⁴ assessed on their lands respectively, and when the owners were not known, the advertisement was to state the total amount of taxes upon the several lots or half lots.

The 16 Vic. c. 182, required the Sheriff,⁴ immediately upon receipt of the Treasurer's warrant to prepare a list of all the lands included therein, and the amount of arrears due on each parcel, and cause the same to be published for the space of three months in the Government Official Gazette, and in some one newspaper published within the county, or if none published in the county, in some newspaper published in an adjoining county. In this advertisement lands patented were to be distinguished from those the fee of which was in the

1. Sec. 50.

2. Sec. 51.

3. Sec. 52.

4. Sec. 57.

Crown,⁵ and it was to contain⁶ a notification that unless the arrears were sooner paid, the Sheriff would proceed to sell the lands for the taxes, on some day named in the advertisement, which day was required to be more than three months after the first publication. A notice similar to the advertisement was also to be posted in some convenient and public place at the Court House of the county, at least three months before the time of sale.⁷

Under the recent acts⁸ the advertisement issued by the County Treasurer, who is now the officer entrusted with the sale of lands for taxes, is to contain similar information as to the amount of arrears, a notification that the lands will be sold on a given day unless these are sooner paid, and to distinguish the lands as patented or unpatented. In addition the advertisement is to state in a separate column the proportion of costs chargeable upon each lot for advertising, and for the commissions allowed to the Treasurer.

The advertisement is by these acts⁹ to be published four weeks in the Official Gazette, and once a week for thirteen weeks in some newspaper published in the county, or in an adjoining county, as the case may be. It is also expressly enacted¹ that the day of sale shall be more than ninety-one days after the first publication of the list."

This section was probably introduced on account of the doubt raised in the case of *Connor v. Douglas*.² In that case, it was held by the Chancellor (and afterwards approved by the Court of Error and Appeal) that publication in the *Canada Gazette* for thirteen weeks, from

5. Sec. 56.

6. Sec. 57.

7. Sec. 57.

8. 29 & 30 Vic. c. 53, ss. 183, 134; Ont. Stat. 32 Vic. c. 36, ss. 182, 133.

9. Sec. 133; sec. 132.

1. Sec. 135; sec. 134.

2. 15 Grant, 456.

and including the 1st of August, to and including the 24th October, 1857, though not an advertisement for three months, which would have required the advertisement to be continued till and to include the 31st of October, did not render the sale invalid.

In *Jarvis v. Brooke*³ it was held that the omission to advertise the sale in the county local paper, the advertisement being regularly published in the *Official Gazette*, did not invalidate the sale. This decision was arrived at because such an omission would not, on common law principles, avoid a sale under execution.

The Court of Common Pleas, however, in *Williams v. Taylor*,⁴ held that the omission to advertise in a local paper under the special provisions of 16 Vic. c. 183, ss. 7 & 8, avoided the sale; saying, "The omission of either of these advertisements interposes an insuperable obstacle to the application of the remedial portion of the act in favour of purchasers at such sales."

In the later case of *Hall v. Hill*,⁵ the Court of Queen's Bench, speaking of *Williams v. Taylor*, said, "That decision, though under a different statute, was upon a case very analagous in principle, and if it were necessary for the decision of this case, we should, as at present advised, arrive at the same conclusion."

(g) *Sale.*

By the 6 Geo. 4 c. 7, no⁶ sale was to take place in less than six months from the delivery of the writ to the Sheriff, nor was any sale to be made out of the township in which the land was situate, unless the township was so thinly inhabited as to have no meeting held within it for the election of parish officers, in which case the

3. 11 Q. B. U. C. 299.

4. 13 C. P. U. C. 219.

5. 22 Q. B. U. C. 578.

6. Sec. 11.

sale might take place in the township to which the same might be annexed for the purpose of holding its annual town meeting.

The⁷ mode of selling was to be by public auction, and the assessment in arrear and the expense attending the writ was to be declared, and the person who offered to pay the assessment and expense for the least portion of the lands was to be considered the purchaser.

In selling, the Sheriff was to expose the lands for sale in the following manner;⁸ "He shall begin at the front angle on that side from whence the lots are numbered, and measure backward, taking a proportion of the width corresponding in quantity with the proportion of such particular lot, in regard to its length and breadth, according to the quantity required to make the sum demanded; and at every subsequent sale of a portion of the same lot or parcel of land, under this act, shall proceed to take a tract of equal width as the former, measuring backward from the limits of the tract last sold." Where the Sheriff could not, from the position or description of the land, pursue the mode pointed out above, he was to sell such portion of the lot as appeared to him most for the interest of the proprietor.⁹ He had also¹ power to adjourn the sale from day to day, giving public notice thereof, and if any person did not pay the amount of his purchase on the day of sale the Sheriff could re-sell on any other day to which the sale was adjourned.

Several alterations were made in 1837, by the 7 Wm. 4, c. 19. The sale² of lands for arrears of taxes was to take place in the Town in which the General Quarter Sess-

7. Sec. 12.

8. Sec. 13.

9. Sec. 14.

1. Sec. 16.

2. Sec. 1.

ions for the District were held, on the second day of the sitting of the Court, at or near the Court House.

The land was to be put up for sale at an upset price of two shillings and sixpence an acre, and if there was no bidder at that rate, then the Sheriff was to proceed according to the former act,³ at the next Court of Quarter Sessions after the expiration of the six months' notice required by law.

The fifth section made it lawful for the Sheriff to put up and adjudge to the purchaser such part of the lot as he might in his discretion think best for the interest of the proprietor.

The 13 & 14 Vic. c. 67, required the⁴ Sheriff to sell by public auction, so much of the lands as should be sufficient to discharge the taxes, with the interest thereon, and all lawful charges incurred in and about such sale and the collection of the taxes, selling in preference such part of the land as he might consider it most for the advantage of the owner to sell first. The 16 Vic. c. 182, contained⁵ a similar provision.

Where the Sheriff sold land of which the fee was in the Crown, he was to sell only the interest therein of the lessee or locatee.⁶

The recent acts⁷ which substitute the Treasurer for the Sheriff as the officer who is to sell lands for taxes, contain provisions exactly the same as to selling such part as the Treasurer may consider best for the owner to sell first. These acts further declare that "In offering such lands for sale, it shall not be necessary to describe particularly the portion of the lot which shall be sold, but it

3. Geo. 4. c. 7.

4. Sec. 53.

5. Sec. 59; and see Con. Stat. U. C. c. 55, s. 137.

6. 16 Vic. c. 182, s. 55; Con. Stat. U. C. c. 55, s. 138.

7. 29 & 30 Vic. c. 53, s. 139; Ont. Stat. 32 Vic. c. 36, s. 138.

shall be sufficient to say that he will sell so much of the lot as shall be necessary to secure the payment of the taxes due." This clause was probably inserted because V. C. Mowat had held⁸ it necessary that the Sheriff should state to intending purchasers what portion of the lot was being offered for sale.

The sale of a whole lot which lay in two concessions, for an arrear of taxes alleged to be due upon one half, has been held illegal, because there was no such distinct half to be assessed.⁹ The assessment should have been on the whole lot.

A sale for a total charge of £5. 11s 8d, of which only £1. 8s. had been legally imposed, was held to be wholly void;¹ but the good rate being separable from the bad, held not to defeat a distress in toto.²

In *Allan v. Fisher*,³ however, Draper, C. J., though he considered he was bound by the authorities on the point, said, I have felt a difficulty in holding a sale entirely void, on the ground that the amount directed to be levied was larger than was properly due."

A purchaser procuring the whole lot to be knocked down to him, by requesting the bystanders not to bid against him, as he wanted to confirm his title by purchasing it in, acted improperly, and the sale so conducted is void.⁴

In *Henry v. Burness*,⁵ where the conduct of the Sheriff in selling the whole of a valuable lot of land for a

8. *Knaggs v. Ledyard*, 12 Gr. 370.

9. *Doe d. Upper v. Edwards*, 5 Q. B. U. C. 594; *Monro v. Gray*, 12 Q. B. U. C. 647; see also *McDonald v. Robillard*, 23 Q. B. U. C. 105; *Laughtenborough v. McLean*, 14 C. P. U. C. 175; *Ridout v. Ketchum*, 5 C. P. U. C. 55; *Black v. Harrington*, 12 Gr. 176; *Christie v. Johnston*, 12 Gr. 534.

1. *Doe d. McGill v. Langton*, 9 Q. B. U. C. 91; *Irwin v. Harrington*, 12 Gr. 179.

2. *Corbett v. Johnston*, 11 C. P. U. C. 317.

3. 13 C. P. U. C. 72.

4. *Todd v. Werry*, 15 Q. B. U. C. 614.

5. 8 Gr. 345.

trifling amount of taxes was impeached, counsel contended that the Sheriff could not be taken to know the value of a whole lot necessarily so greatly exceeded the arrears of taxes that a sale of the whole was improper. But V. C. Spragge said,⁶ "This implies that the Sheriff is not bound to acquaint himself with what he is selling; that he may remain properly ignorant of the improvements, the quality or the soil, and of every particular beyond the number of the lot and the assumed quantity. I by no means concede that he can properly be ignorant of these particulars; he has peculiar facilities for becoming acquainted with them; and if he had not, still if it be his duty to sell for the best price, as I take it to be, he cannot discharge that duty if so utterly ignorant of what he is selling as not to know whether it is worth £2 10s. or £500. Besides, the statute, in making it the duty of the Sheriff to sell not only as little as possible, but that part which is least injurious to the land-owner, seems to contemplate his making himself acquainted with the land he is selling."

In that case, combination among the purchasers was also relied on as a ground for setting aside the sale. On that head the learned Vice Chancellor said, "I do not mean to say that actual combination is necessary to invalidate such a sale. The prevention of competition by any undue means, I apprehend, would be sufficient, because against public policy, and a fraud upon the sale."⁷

Where the writ to sell was delivered to the Sheriff when in office, but he did not sell till he was out of office, the sale was held invalid, as it was not shown that he had while in office, begun to act upon it.⁸

⁶ Ibid, 857.

⁷ See also *Davis v. Clark*, 8 Gr. 358.

⁸ *McMillan v. McDonald*, 26 Q. B. U. C. 454.

It has been doubted whether land, improperly assessed as non-resident land, when it was in fact occupied, can be legally sold for arrears.⁹

Where taxes are due to an old county, and taxes become due to a new county after separation, the sale for both arrears should be made by the Sheriff of the new county where the land lies.¹

(h) Payments.

None of the acts in express terms authorize the Sheriff to receive payment of the taxes in arrear after receipt of the warrant to sell. The 53rd section of the 13 & 14 Vic. c. 67, directs the Sheriff to sell "if no person shall appear to pay the taxes at the time and place appointed for the sale." And in the subsequent acts,² the words used are, "If the taxes shall not have been previously collected, or if no person shall appear to pay the taxes at the time and place appointed for the sale." These expressions imply that the Sheriff may receive payment, and accordingly it has been held that a payment of taxes to the Sheriff, while he had the warrant to sell, is good.³

After the sale takes place the owner has still a period allowed for redeeming. This was at first twelve months,⁴ then it was extended to three years,⁵ and again reduced⁶ to "one year from the day of sale, exclusive of that day," at which it has since remained.⁷

9. *Allan v. Fisher*, 13 C. P. U. C. 68.

1. *Doe d. Mountcashel v. Grover*, 4 Q. B. U. C. 23.

2. 16 Vic. c. 182, s. 59; Con. Stat. U. C. c. 55, s. 137; 29 & 30 Vic. c. 53, s. 139; Ont. Stat. 32 Vic. c. 36, s. 138.

3. *Doe d. Sherwood v. Mattheson*, 9 Q. B. U. C. 321; *Jarvis v. Cayley*, 11 Q. B. U. C. 282; *Jarvis v. Brooke*, 11 Q. B. U. C. 299.

4. 6 Geo. 4, c. 7, s. 18.

5. 13 & 14 Vic. c. 67, s. 54.

6. 16 Vic. c. 182, s. 64; Con. Stat. U. C. c. 55, s. 148.

7. 29 & 30 Vic. c. 53, s. 149; Ont. Stat. 32 Vic. c. 36, s. 148.

After the sale of a whole lot for taxes, the Treasurer may receive payment of the taxes in redemption of a part of it, if the lot had been in fact subdivided, and the Treasurer determines in good faith that such part was a distinct division.⁸

If the Treasurer can take notice of land granted, though not returned as such, he must take notice of the particular part of the lot so granted, and he must apply the payments made to him on the part so granted.⁹

(i) *Description of Lands.*

The 6 Geo. 4. c. 7, having fixed the manner in which the Sheriff was to ascertain the exact portion sold, by beginning to measure it from a given point and taking a proportionate width of the lot, a description of thirty acres of Lot 15, &c., *to be measured according to the statute*, has been held a sufficient description.¹

The subsequent act 13 & 14 Vic. c. 67, which required the Sheriff to sell the part most advantageous for the owner, provided that he should state distinctly in the certificate to be delivered to the purchaser, what part of the lot was sold, or that the whole lot was sold, as the case might be; and the deed given to the purchaser was² to describe the land by its situation, boundaries and quantity.

In the 16 Vic. c. 182, ss. 59 & 65, the words used as to the certificate and deed are the same as those in the 13 & 14 Vic. c. 67, ss. 54 & 57.

The more recent acts³ require the Treasurer to, "give

8. *Payne v. Goodyear*, 26 Q. B. U. C. 448; *Brooke v. Campbell*, 12 Gr. 526.

9. *Peck v. Mouro*, 4 C. P. U. C. 363.

1. *Fraser v. Mattice*, 19 Q. B. U. C. 150; *McIntyre v. G. W. Railway Co.*, 17 Q. B. U. C. 118.

2. Sec. 57.

3. 29 & 30 Vic. c. 53, s. 147; Ont. Stat. 32 Vic. c. 36, s. 146.

a description of the part sold with sufficient certainty, and if less than a whole lot, then by such a general description as may enable a surveyor to lay off the land sold on the ground."

A description of the land sold by the Sheriff as "eighty-nine acres of the south part of Lot twenty-five, &c.," would be insufficient, for want of the proper boundaries defining the precise locality.⁴

(k) *The Deed.*

Where lands were sold under the 6 Geo. 4, c. 7, but no deed was made of them while that act was in force, it was held that no deed could be made after the repeal of this act in 1851, as no provision was made for such a case,⁵ and the same thing was decided as to sales made under 13 & 14 Vic. c. 67.⁶ A deed may now be made by the successor of the Sheriff who sold.⁷

Formerly no time was limited within which it was necessary to register a deed of land sold for taxes, but it is now necessary to register it within eighteen months after the sale.⁸ The same acts require all deeds on tax sales, before the passing of the acts, to be registered within one year after the passing of the acts.

In the case of *Cotter v. Sutherland*,⁹ an objection was taken which the Court said struck at the root of every tax sale resting upon a rate imposed before the General Assessment Act of 1850, and invalidated every one of them. This objection was that no Court of Quarter

4. *McDonell v. McDonald*, 24 Q. B. U. C. 74; see also *Taylor v. Foster*, 25 Q. B. U. C. 405; *Knaggs v. Ledyard*, 12 Gr. 320; *Fraser v. Mattice*, 19 Q. B. U. C. 150.

5. *Bryant v. Hill*, 23 Q. B. U. C. 96.

6. *McDonald v. McDonell*, 24 Q. B. U. C. 424.

7. 27 & 28 Vic. c. 2, s. 43.

8. 29 Vic. c. 24, s. 57; Ont. Stat. 31 Vic. c. 20, 58.

9. 18 C. P. U. C. 357.

Sessions ever imposed a rate of any kind upon wild lands, but that the Treasurer of his own motion, charged every wild lot one penny in the pound of its statutable value, under the idea that the statute directly imposed that tax upon the land.

In the same case many points of importance were decided for more particular notice of which reference must be made to the very able and exhaustive judgment delivered by Mr. Justice Adam Wilson.

10. *Sheriffs Deeds.*

Where a title is derived through a sale by a Sheriff under an execution, the purchaser's solicitor must see that there is a judgment duly entered up of record;¹ that the writ under which the Sheriff sold was valid on the face of it;² and that it was acted on while current.³

A purchaser under a writ valid on its face will be protected even through the judgment under which the land was sold should afterwards be reversed for error appearing on the record.⁴

The conveyance from the Sheriff is *prima facie* evidence that the writ was delivered to him, that he took the lands in execution, and sold them.⁵ A purchaser is not bound to enquire whether a writ against goods was properly returned "*nulla bona*" before the writ against lands was issued.⁶ Neither need he enquire whether the lands were duly advertised or not, as errors and defects in the advertisements, either in the Gazette or

1. *Doe d. Boulton v. Ferguson* 5 Q. B. U. C. 515; *McDonell v. McDonell*, 9 Q. B. U. C. 259; but see, *Douglass v. Bradford*, 3 C. P. U. C. 459.

2. *Doe d. Hagerman v. Strong*, 4 Q. B. U. C. 510.

3. *Doe d. Greenshields v. Garrow*, 5 Q. B. U. C. 237; *McDonell v. McDonell*, 9 Q. B. U. C. 259; *Gardiner v. Juson*, 3 Ex. & App. 158.

4. *Doe d. Hagerman v. Strong*, 4 Q. B. U. C. 510.

5. *Doe d. Spafford v. Brown*, 3 Q. B. U. C. O. S. 90; *Mitchell v. Greenwood*, 3 C. P. U. C. 465.

6. *Doe d. Myers v. Myers*, 9 Q. B. U. C. 463.

local papers, will not affect the purchaser's title, even if he be one of the execution creditors. A sale was duly advertised in a local paper for three months before the 27th of August, 1864, and an advertisement in some particulars incorrect was inserted in the Gazette of the 11th of June, 1864, and four next issues, the errors being corrected in the sixth insertion, all these advertisements were of a sale on the 27th of August, 1864. On the 1st of October following and in the five next numbers of the Gazette the sale was advertised for the 12th of November, not as a postponement of the previous sale, but this advertisement was not published in a local paper, and although a notice was put up on the door of the Court House, it was not shewn that it was continued there for three months. Under these circumstances the Court of Queen's Bench held⁷ that these advertisements were not a compliance with the statute,⁸ but that the defects would not affect the purchaser's title. In that case C. J. Draper said, "There is no decision that a Sheriff's sale under execution of land is invalid by reason of erroneous or defective advertisements in the Gazette or the local newspaper; and the language of the late Chief Justice in *Jarvis v. Brooke*⁹ shows that there have been decisions (though unreported) the other way, where lands have been sold in execution, and though we might think that the purchaser could have little reason to complain where he was one of the execution creditors, and also the attorney on record, if the proceedings were held hughatory by reason of any irregularity or omission in advertising, we think this no reason for incurring the risk of shaking other titles where the purchaser has had no such necessity or opportunity for watching the proceedings. We think he

7. *Paterson v. Todd*, 24 Q. B. U. C. 293.

8. *Con. Stat. U. C. c. 22, s. 267.*

9. 11 Q. B. U. C. 299; and see *Jarvis v. Cayley*, 11 Q. B. U. C. 289; *Doe d. Dismett v. McLeod*, 3 Q. B. U. C. 297.

ought not, by a decision given for the first time after so many years, to deter purchasers at Sheriff's sales by holding it to be their duty to examine into every step of the Sheriff's proceedings under a valid writ supported by a valid judgment."

The purchaser should satisfy himself that the writ was acted upon while current, as nothing can be done under an execution which has ceased to be current; unless for the purpose of perfecting what has been commenced while it was in force.¹

¹ Doe d. Greenhields v. Garrow, 5 Q. B. U. C. 237; McDonell v. McDonell, 9 Q. B. U. C. 259 Gardner v. Juson, 2 Err. & App. 188.

CHAPTER V.

PRODUCTION AND CUSTODY OF DEEDS.

1 *Attested Copies.*

The title having been approved of, the next question is, whether deeds relating to the property will be handed over to the purchaser on the completion of the contract. Formerly when the vendor warranted the title against all the world he was allowed to retain the deeds, the better to enable him to defend the possession which he thus took upon himself to vouch.² But now the vendor covenants for his own acts and deeds only, and not for the defaults and incumbrances of former proprietors; these the purchaser takes upon himself.³

One consequence of the purchaser taking the title on himself, is a right to the possession of the title deeds provided they relate exclusively to the land sold, but if they relate to other property which is retained by the vendor, though of smaller value, the practice is, that the vendor is entitled to retain the deeds, but then he must give the purchaser attested copies of all the deeds abstracted which were not of record sufficient to make a title, at his own expense, and execute a covenant to produce them at the purchaser's expense, unless there be an original stipulation to the contrary.⁴

Possibly, upon a sale under a decree of the Court of Chancery, a deposit of the deeds in the office of the Master, or of the Clerk of Records and Writs, might be

2. Co. Lit. 8 a.

3. Cov. Con. Ev. 114.

4. Cov. 2. Ev. 115.

sufficient to preclude the right to attested copies.⁵ In *Dare v. Tucker*,⁶ Lord Eldon, on making an order for the delivery of attested copies, qualified his order by the expression, "Unless you leave the originals, or make some other proposal in the Master's Office.

The next question is, of what deeds and documents is the purchaser entitled to attested copies?

The answer is, only of such as are necessary to make a title, and not to any which are of record.

In reference to documents on record, the rule is that the purchaser is not entitled to copies of these, as he can, by applying to the record which is always extant, obtain more authentic evidence than he can by an unsworn copy.⁷ And a purchaser is not entitled to copies of any instruments which are produced merely to negative a possibility, and which he could not have compelled the vendor to produce had they not been in his possession.⁸

In England the Prerogative Court of Canterbury and other Ecclesiastical Courts are not Courts of Record, so attested copies of wills or other instruments, registered in these Courts may be required at the vendor's expense; unless it was otherwise provided for at the time of purchase.⁹ In this Province the Surrogate Courts in the various counties are Courts of Record by statute,¹ but the Court of Probate prior to its abolition was not a Court of Record, nor were the Surrogate Courts, until the passing of the 22 Vic. c. 95. A purchaser is, therefore, entitled, in the case of a will proved before the 16th day of August, 1858, to call for an attested copy.

5. Dart on Vendors 772.

6. 6. Ves. 409.

7. Cov. Con. Ev. 117.

8. Dart on Vendors, 222.

9. Cov. Con. Ev. 118.

1. Con. Stat. U. C. c. 16, s. 2.

An attested copy of the probate may, perhaps, be of as much real value as an office copy of the will, but as the probate is in itself only a secondary instrument, the purchaser is reasonably entitled to something more than a copy of a copy.

Where the title deeds cannot be delivered, even trustees are bound like other vendors to furnish attested copies.²

2. *Covenant for Production.*

When the sale is completed the purchaser is entitled to the original title deeds, or to a covenant to produce them, and to attested copies of the originals,³ this right does not however seem to extend to old deeds not necessary to make a title,⁴ nor to documents used merely as negative evidence.⁵

The first and most important consideration on this covenant, is its currency with the land. To ensure this there must be a legal privity between the covenanting parties.⁶ Covenants for production are real covenants, and run with the land for the benefit of purchasers, but not for the benefit of vendors;⁷ in other words, purchasers from the covenantee may take advantage of them against the covenantor himself but the liability will not extend to the covenantor's assignees.⁸ The covenant to produce is therefore commonly said to be lost by the holder aliening the lands in respect of which he was allowed the custody of the deeds.⁹ This how-

2. Dixon on Title Deeds, 243; Cov. Con. Ev. 119.

3. Boughton v. Jewell, 15 Ves. 178.

4. Dare v. Tucker, 6 Ves. 442.

5. Dart on Vendors, 93, 357, 442.

6. Cov. Con. Ev. 125; Dart on Vendors, 358.

7. Barclay v. Raine, 1 S. & S. 449.

8. Platt on Covenants, 227.

9. Cov. Con. Ev. 129.

ever is scarcely accurate. It is true he may with the estate deliver over the deeds to a purchaser, but this does not exonerate him or his heirs from his covenant to produce the deeds. If he has neglected to take any legal obligation from the second purchaser to produce the deeds when he shall be called upon to do so, and cannot prevail on him to produce them on any given occasion, then he, or his heirs, if bound, are liable to an action on the covenant to produce, and damages to the amount of the injury proved, will be given against them.¹

It has been said that a covenant to produce all deeds, papers and writings generally, without a schedule, is a mere nullity,² still if it can be shewn that the covenantor is in possession of a document or set of documents relating to the lands, he would without doubt be held bound by his covenant.³

On a sale by fiduciary vendors it is usual to insert a proviso in the covenant for determining the vendor's liability upon his selling the residue of the property, and procuring a substituted covenant to be entered into by the person who will upon such a sale become the holder of the deeds.⁴ The proviso when inserted should provide for the actual delivery of the substituted deed of covenant to the purchaser or his representative.

A purchaser is not bound, however,⁵ and perhaps cannot be advised, to assent to the introduction of such a proviso, except upon sales by the assignees of a bankrupt.⁶

If the purchaser has omitted to take a covenant for the

1. Cov. Con. Ev. 129, 130.

2. *Shaw v. Shaw*. 12 Price 163.

3. Cov. Con. Ev. 132.

4. *Dart on Vendors*, 358; *Dixon on Title Deeds*, 243.

5. *Sug. V. & P.* 452.

6. *Dart on Vendors*, 357.

production of deeds, he cannot, under the covenant for further assurance, require the vendor to enter into such a covenant.⁷

A purchaser will not in any case be compelled to complete his purchase where the deeds are outstanding, unless he has a covenant for their production.⁸

In *Barclay v. Raine*,⁹ Vice Chancellor Sir John Leach, held, that "a Court of Equity never compels a purchaser to take without the title deeds, unless he has a covenant to produce them, and a right in equity to compel the production of the deeds, even if it existed, would be no answer."

3. *Custody of Deeds.*

As a general rule every owner of property for the time being is entitled to the possession or custody of the title deeds relating to the property, whether his estate be in fee simple or in fee tail, or freehold not of inheritance, or an estate on condition as mortgagee, or other defeasible estate, for a mortgagee is considered as an owner to the extent of his mortgage.¹

Where a tenant for life, or a person entitled to part of the land, has possession of the title deeds, the Court will not, at any rate without some good reason, take them out of his hands.²

If an estate affected by one set of title deeds be sold in lots, and no condition is inserted as to the custody of the deeds, the vendor is entitled, if any lot, however small, remains unsold, to the custody of the deeds; but if there

7. 1 Ryth, 102; Platt on Covenants, 231; Dart on Vendors, 311.

8. Dixon on Title Deeds, 243.

9. 1. S. & S. 449.

1. Lee on Abs. 306; Cov. Con. Ev. 135.

2. Foster v. Crabb, 12 C. B. 136.

is no stipulation to the contrary, he must furnish the purchasers with attested copies.³

On a sale in lots it is generally requisite to provide for the ultimate custody of the deeds, which, in the absence of a stipulation, go to the purchaser of the lot largest in value; or rather it is conceived, to the purchaser whose aggregate purchase money amounts to the largest in value.⁴ If the vendor on a former occasion has sold any portion of the land and retained the deeds, and now sells the residue, so that he has no pretence for retaining any evidence of the title himself, the present purchaser standing in the place of the vendor, has, it is conceived, a better right to the custody of the deeds than the former purchaser, though his purchase concern the largest portion of the lands embraced in the deeds.⁵

It must be remembered that it is only when title deeds come from the proper custody, that their due execution according to their purport can be assumed without proof.⁶

3. Con. Con. Ev. 137.

4. Dart on Vendors, 94.

5. Cov. Con. Ev. 138.

6. Cov. Con. Ev. 13, 19, 41.

CHAPTER VI.

SECONDARY EVIDENCE AND PRESUMPTIONS.

1. *Secondary Evidence.*

To the admission of secondary evidence, proof of the loss or destruction of the original document is a necessary preliminary. Proof of the destruction more readily lets in the secondary evidence of a copy, than proof of the loss, which must ever be incomplete and exceptionable.⁷ Before the secondary evidence can be received, the same evidence of their loss and contents must be given as on a hearing in equity, or on a trial at law.

The degree of diligence to be used in seeking for an original document, before a party can give secondary evidence of its contents, must depend, in a great measure, upon the circumstances of each particular case. If a paper be of considerable value, or if there be reason to suspect that the party not producing it, has a strong interest which would induce him to withhold it, a very strict examination would properly be required; but if a paper be useless, and the party could not have any interest in keeping it back, a much less strict search would be necessary to let in secondary evidence of its contents.⁸

The point to guard against in this respect is a pledge or deposit of the original document.⁹ Parties searching for a missing deed should remember that the person entitled to the first immediate estate of freehold is entitled to retain the title deeds as against those entitled in remainder or reversion;¹ and that the deeds are pre-

7. Cov. Con. Ev. 312.

8. Cov. Con. Ev. 312.

9. Cov. Con. Ev. 313.

1. Dixon on Title Deeds, 35; Webb v. Lymington, 1 Eden, 8.

sumed to follow the title and to go into the custody of those entitled.²

When the lands descend to real representatives, they, and not the personal representatives, are entitled to the deeds, though for greater certainty a search with the latter would be advisable, especially in the case of a missing mortgage.

The presumption that the deeds follow the title may be destroyed, as for instance, by the fact that they covered other lands retained by the vendor,³ or that some prior owner on sale of a portion gave a covenant to produce them.

Where the document, if in existence, should be in the possession of the party who desires to give secondary evidence of its contents, the proper course is that he should search with a witness, and that the search should be so conducted, and in such places, as to afford a reasonable ground for concluding that it was made bona fide, both as regards the witness and the party, by giving and using all possible facilities to make it effectual.⁴

Where sufficient evidence has been given of destruction of the original document, or of search and loss to let in secondary evidence, memorials afford, in cases of conveyance, a frequent means of furnishing such evidence, and are admissible or not according to circumstances.

A memorial signed by a grantor, who was not shown to have had more than mere constructive possession by force of the conveyance to him, has been held to be evidence not merely against the grantor, and all claiming under or in priority with him, but also against third per-

2. Leith's Real Prop Stat 427.

3. Yeo v. Field, 2 T. R. 708.

4. Bratt v. Lee, 7 C. P. U. C. 280.

cons not appearing to have any title whatever except a bare possession of insufficient duration to confer a title, as being a statement and act by the party in possession against his own interest as reputed owner of the land.⁵

Though the weight of authority is in favour of taking a memorial executed by a grantor as good secondary evidence even against strangers, without corroborative evidence, it is not clear that this would be so if at the time of the conveyance sought to be proved some one were in possession adversely to the grantor.

Many of the principles whereon a memorial signed by a grantor is admissible as evidence of a conveyance by him, do not apply where it is executed by a grantee.

In the latter case it is a statement, not against, but in support of interest, and by a person not then in possession. But such a memorial, if coupled with other facts confirmatory of the instrument set out in it, is admissible as parcel of the evidence towards proof.

A memorial executed by a grantee through whom a person claims, coupled with possession taken under the instrument to which it relates, and enjoyed for a length of time in a mode such as to preclude the possibility of the instrument being other than as set forth by the memorial, is good evidence even against strangers, especially if accompanied by other corroborative facts, but the mere memorial would be evidence only against those claiming under or in privity with the grantee.⁶

There seems, however, some danger in allowing mere length of possession and dealing with the property to be sufficient corroborative evidence on which to admit a memorial executed by a grantee as evidence of a conveyance in fee simple absolute. Until the recent Registry Act it was not necessary to set out in a memorial the

5. *Russell v. Fraser*, 15 C. P. U. C. 375; but see *Hayball v. Shepherd*, 25 Q. B. U. C. 536.

6. *Gough v. McBride*, 10 C. P. U. C. 166; *Fields v. Livingstone*, 17 C. P. U. C. 15.

estate or interest conveyed, and in the case of a conveyance for life, a fraudulent grantee might execute a memorial referring to an instrument granting a fee simple absolute. He might then after destroying the deed, convey in fee, and the property might pass through various hands during his lifetime, and there might thus be possession and dealing with the property for fifty years, consistent with the right of possession and with the conveyance in fee as set out in the memorial.

The persons entitled in reversion are not supposed to enquire until their right accrues, and when it does they have to contend against evidence offered of the fraudulent memorial and the possession and dealing said to be consistent with it.

The cases when examined, hardly go the length of holding that mere length of possession though for a considerable time under an alleged grant in fee coupled with a memorial executed by the grantee, is sufficient evidence. There are either other facts which lead to the belief of, or are confirmatory of the instrument; or, if mere length of possession alone has been considered sufficient, it has been in cases other than on a question of whether the conveyance was in fee simple absolute to the grantee, and where the possession had was quite inconsistent with the instrument being otherwise than as set out in the memorial.

As between vendor and purchaser, and on proceedings under the Act for Quietting Titles, stricter evidence is required than in ejectment; it is necessary where a party relies on memorials as proof of missing deeds, to show that the deeds contained no trust, limitation, condition, exception or qualification not mentioned in the memorial. The execution of a memorial which is receivable in evidence need not be proved when more than thirty years old.⁷

⁷ *Dea Maclean v. Turnbull* 5 Q. B. U. C. 119.

Where a foundation is laid by proper search or otherwise for the admission of the contents of a memorial as evidence, and when requisite, sufficient corroborative circumstances or privity shown, a memorial, though not thirty years old, produced from the Registry Office need not be proved; and a copy certified by the Registrar as such is also admissible without proof of the execution of the original, or of the instrument to which the original relates.⁸

If a petitioner, under the Act for Quieting Titles, intends to use certified copies of memorials as evidence, he must also procure and produce certified copies of the affidavits of execution.

With respect to copies generally, it is to be observed that a copy of a copy is not evidence, for the Courts require the best evidence the nature of the thing admits, and the further off anything lies from the first original truth, the weaker must be the evidence; besides there must be a chasm in the proof; for it cannot appear that the first was a true copy.⁹

2. *Voluntary Affidavits.*

Voluntary affidavits are frequently resorted to, and required by conveyancers under a choice of difficulties, in support of facts and averments, when more direct proof cannot be obtained.¹ These documents, though possessing no legal validity, are often all the evidence that can be adduced; and as it were by general consent the profession adopt them as evidence upon titles.²

As legal evidence, such affidavits are clearly inadmis-

8. *Marvin v. Hales*, 6 C. P. U. C. 211; *Lynch v. O'Hara*, 6 C. P. U. C. 267; *Doe d. Prince v. Girty*, 9 Q. B. U. C. 41.

9. *Cov. Con. Ev.* 313.

1. *Cov. Con. Ev.* 319.

2. *Lee on Abs.* 215; *Hubback on Suc.* 66.

sible; they are purely voluntary, and not being made in Court in any cause, they will not sustain an action for perjury; then they are made expressly to support some point, and are, therefore, on the face of them, not of that pure and disinterested character which is expected from unexceptionable evidence; and they frequently contain nothing more than hearsay evidence; yet the conveyancer admits this testimony as corroborative evidence of general reputation and concurrent possession.

It should always appear on the face of the affidavit that the deponent is likely to be acquainted with the facts, and reasonable grounds for his belief should be stated.³

3. *Recitals.*

Recitals or statements contained in Acts of Parliament and in deeds, decrees and other instruments, furnish very important secondary evidence.

A recital is rather an interested witness, for it is seldom ever made with the knowledge and concurrence of parties having an adverse title; it is a tale told by the party whose interest it is to support the deed, and, therefore, is not of that unprejudiced character which other evidence preserved without reference to any particular transaction is impressed with.⁴

The general rule acted upon by conveyancers has been, that recitals and statements contained in deeds thirty years old or upwards may be considered as good secondary evidence, and where the facts recited are not very important, a purchaser may rest satisfied with such recitals without further evidence, even if contained in deeds of more recent date.⁵

Among the recitals deemed of minor importance, may

3. Cov. Con. Ev. 319.

4. Cov. Con. Ev. 298; Lee on Abs. 364.

5. Lee on Abs. 380; Cov. Con. Ev. 298.

be mentioned such as relate to facts corroborated in part by other evidence, recitals of deaths, burials, marriages, births or baptisms; the number of children in a family, the failure of issue, or as to one person having survived another, or that one was the executor or administrator of another, as to the occupancy, identity or boundary of lands.⁶

Where the facts are very important, a purchaser should not rely on the recitals even of an old deed; especially if better proof aliunde can be obtained. Thus it has been decided, that it is not sufficient to prove an important descent in a pedigree, for the vendor to set forth deeds which recite the pedigree, although the deeds are upwards of thirty years old.⁷

Recitals as to the contents of deeds are more to be depended upon, than recitals as to pedigrees. Parties may themselves, without any fraudulent intention, mistake a pedigree, the latter therefore require to be more narrowly searched into.⁸ A deed can seldom be incorrectly recited, unless through fraud or otherwise intentionally, much, therefore, depends on the nature of the recital, as well as its antiquity.⁹

The value of the statements and recitals respecting pedigrees in old deeds, depends entirely on the circumstances whether possession has accompanied the deed containing the recital. If the deed itself be not sanctioned by the acquiescence of parties, privies and strangers, the recitals in it are not entitled to much weight.¹ Nevertheless if there be no apparent motive for misrepresentation, and the recital is borne out by forty years undisturbed possession, the conveyancers usually give credence to the statement.²

6. Lee on Abs. 360, 361; Cov. Con. Ev. 299.

7. Slaney v. Wade, 1 M. & Cr. 358; Fort v. Clark, 1 Russ. 601; Anon, 12 Mod. 334.

8. Lee on Abs. 361; Cov. Con. Ev. 300.

9. Ibid.

1. Cov. Con. Ev. 300.

2. Ibid, 299, 301.

Recitals often have the effect of controlling the operation of a deed, as more clearly expressing the intention of the parties. But recitals cannot be allowed to restrain the operation of words in a deed where those words are of plain as well as known import.

Recitals in deeds cannot alone be taken as evidence against strangers or others not parties to the deed containing such recitals. If it was otherwise, nothing would be easier than to insert recitals as the foundation of a good prior title; thus a man might in a post-nuptial marriage settlement insert a recital of ante-nuptial articles which never existed, and so defraud his creditors contrary to the 13 Eliz. c. 5.

Recitals are always taken as admissions of those who are parties to the deed and interested in the property. Thus,³ where a recital occurred in a deed of settlement that the owner of the property had given a bond to another party, which bond was not produced as the execution of it could not be proved, the recital was held to be evidence of the bond having been executed.⁴

But although a recital may be evidence as against parties executing the deed containing the recital of the prior instrument, yet there ought to be some further proof to establish entirely the execution and validity of the recited deed;⁵ a bare recital of a deed, it has been said, is not evidence; but where there are other facts, (such as entries in a solicitor's books of charges for procuring the execution of the deed), which corroborate the recitals,⁶ or where there is other evidence that the instrument recited existed, then the recital may be taken not only as evidence of the existence, but (as against the

3. 1 Swanst. 113.

4. *Annandale v. Harris*, 2 P. Wms. 434.

5. *Ford v. Ld. Grey*, 6 Mod. 45.

6. *Shipwith v. Shirley*, 11 Ves. 64.

parties to the deed containing the recital) as evidence of the execution of the recited instrument.⁷

It appears, therefore, that although recitals may be good secondary evidence of deeds which are shown to have existed, but which have been lost or destroyed, yet the rule cannot be extended to those cases in which nothing is known as to the deeds to which the recitals relate.⁸

Recitals in a deed prepared by direction of a Court of Equity and settled by a Judge or a Master, are more to be relied on than other deeds, in consequence of the strictness with which facts and statements are required to be verified in the Master's Office.⁹

Notwithstanding the fact, that recitals afford such evidence of prior deeds, yet in regard to the consequences of that evidence, or the notice given by them to purchasers, it is considered that such notice does not entitle a purchaser to demand an abstract of the deeds themselves, although it may entitle him to require the inspection of such recited deeds, if in the custody or power of the vendor, when they bear strongly upon the title.¹

4. *Presumptions.*

In the absence of all direct evidence, presumption may, after a great lapse of time, aided by other corroborative facts, such as uninterrupted enjoyment for a length of time, and acquiescence, or apparent acquiescence, of those whose claims are adverse, be relied on, particularly where the importance of the fact is inconsiderable.² Thus possession is *prima facie* evidence of property, but the landlord may prove that the occupier is his ten-

7. 5 B. & C. 601.

8. Lee on Abs. 363.

9. Ibid.

1. Lee on Abs. 364.

2. Lee on Abs. 464.

ant by showing a payment of rent or other acknowledgment.³

In the case of births and marriages many facts may be adduced in support of the presumption of one from circumstances in connection with the other; for instance, the birth or baptism of a child being proved, gives much weight to the presumption of a marriage between the parties whose child it is stated to be. Proof of a marriage prior to the time of the birth of a child affords ground for presuming that such child is the issue of the parties so married, if the mother be known; and where a birth is proved a short time only after the marriage, the possibility that it is the eldest child of that marriage amounts almost to certainty.⁴

In regard to marriages there are many grounds for raising a presumption of marriage in the absence of direct evidence of the fact. The parties having always lived together as man and wife, and having in common reputation been received by their friends, and passed as such; children being described as the children of A. and B. his wife; their so styling themselves in wills; and other matters less important than these, if ancient in date, have been allowed to raise the presumption of marriage in common cases.⁵

It is found by common experience to be a necessary presumption that a person of the same name and conveying the same interest as that limited to a person previously mentioned, is the same person. Unless there is a great interval between any two deeds, evidence of identity is seldom called for; if such a chasm exist it may be proper to require evidence of the occupation in the interval.⁶

3. Cov. Con. Ev. 320.

4. Lee on Abs. 464.

5. Lee on Abs. 465; *Baker v. Wilson*, 8 Grant, 376.

6. Cov. Con. Ev. 321.

The law never makes a presumption that acts are wrongly done, or that fraud has been committed, unless there is good ground for believing such to be the fact; presumptions, if made where nothing is known, are always that things are rightly done, or in favour of order and regularity.⁷

In the absence of all proof or knowledge of facts there can be no presumption except what the law itself points out. In some cases an inference may be made from nothing being known to the contrary for a series of years.

In any case of alleged quiet possession or of no claims made, there can be no presumption where there is no knowledge, except such as can be drawn from acquiescence, or apparent acquiescence, in the title of the party in possession; thus where no adverse claim has been heard of for a length of time, quiet possession may be inferred or presumed.⁸

It is the practice of Courts of Law, where a person has not been heard of for a number of years, to presume his death after seven years, but a seven years' absence without tidings is not sufficient to raise this presumption with conveyancers.⁹ Every case must depend on its own particular circumstances, and no certain period can be fixed which will raise the presumption. It has been admitted by Courts of Equity after twenty years, in one case after fourteen years, but in a recent case after absence and silence for nineteen years, the Court refused to presume death where the circumstances rendered it improbable that the party, if alive, would have communicated with his friends.¹ Scarcely any length of time will be sufficient to compel an unwilling

7. Lee on Abs. 465; Cov. Con. Ev. 319.

8. Lee on Abs. 466.

9. Dart on Vendors, 228.

1. Bowden v. Henderson, 2 Sm. & G. 360.

purchaser to take a title depending on such a presumption of death, unless made with reference to the age of the party said to be dead ; and if the party whose death is asserted was, when last heard of, very young, the period must be that beyond which human life does not commonly extend.² If the presumption to be made is, death without issue, it is doubtful if a court would as against a purchaser ever make the presumption within the period of sixty years.³

2. Lee on Abs. 406.

3. Ibid, 407.

CHAPTER VII.

QUIETING TITLES.

In 1865 an Act was passed⁴ "For quieting titles to real estate in Upper Canada," which has proved a great boon to land owners in this Province.

The objects for which the act was passed are stated in the preamble to be, "To give certainty to the title to real estate in Upper Canada, and to facilitate the proof thereof; and also to render the dealing with land more simple and economical."

As the law stood before the passing of this act, an owner of land might have an indisputable title, every link in the chain of which he could easily prove, but he had no certainty that when he might, years after, be called upon to prove his title he could do so. Title deeds might, in the meantime, be lost, or accidentally destroyed, witnesses might die, or important facts might have escaped from their memories.

Even if his title was in any way attacked, he had in most cases only an opportunity of shewing his legal title. In an action at law, questions of the equitable title, or of equitable interests are rarely touched, and whatever may be the result of the action, it is binding only on the parties to it. If repeated actions are brought, the same steps have to be gone through, and the same evidence adduced, in each action.

Besides, many of the defects in a title are such that if known of in time, they can easily be remedied, but are incurable after the lapse of some years. The original

4. 29 Vic. c. 25.

parties to the transaction may be dead, and their heirs, minors or unknown, so that confirmation deeds cannot be got. Or those who are in a position to take advantage of the defect, may be tempted to do so by a rise in the value of the property.

The intention of this act is to remedy these evils as far as possible by permitting any owner of land to have his title submitted to judicial investigation, and adjudicated upon, even though no hostile claim is being made.

When the owner has established his title after due enquiry, and every precaution on the part of the Court against fraud, he is entitled to a certificate, which is conclusive against the whole world, that at its date the person named in it was the owner of the property, and which is intended as a new starting point for his title. By this means, in the case of every person who has the wisdom to take advantage of the act, the dealing with his property will be a matter of great simplicity.

Any owner of an estate in fee simple⁵ or any trustee for the sale of the fee simple, whether he has the legal estate or not, or whether his title is subject to any charges or incumbrances or not, is entitled to have his title judicially investigated and its validity ascertained and declared. It is always, however, desirable when the petition is presented by a mortgagor that the concurrence of the mortgagee should be obtained.

It⁶ is in the discretion of the Judge before whom proceedings are taken, to permit any other person who has any estate or interest, legal or equitable, in land, to apply for the investigation of his title and a declaration of its validity. This discretion may be exercised at any

5. 29 Vic. c. 25, s. 1.

6. Sec. 2.

stage of the proceedings, and the decision of the Judge is subject to an appeal like any other decision; but the order of Court⁷ requires the Clerk of Records and Writs, where a petition is filed under the second section of the act, to attend a Judge with the petition for directions, before it is referred for investigation.

An application under the act⁸ is made to the Court of Chancery, by filing a short petition, a form of which is given in a schedule to the act.

Before filing the petition the solicitor should carefully and thoroughly investigate the title, and the evidence that can be adduced in support of it. As the registration of a petition not followed by a certificate will form a cloud on the title, he should not file one, if on investigating the matter he discovers any insurmountable defect, or that the necessary evidence on any material point is unattainable.

Petitions⁹ may be referred by the Judge to the Master, or a Deputy Master, or any other officer of the Court, or to any counsel named by the Judge, and in such case the referee proceeds as the Judge himself would if no reference had been made, and has the same powers. The Court has¹ appointed two Referees in the City of Toronto, to whom petitions may be referred, and has also named certain of the Local Masters as Referees.

When a petition is filed, the Clerk of Records and Writs,² delivers to the party filing it a certificate under the seal of the Court and signed by the Registrar³ for registration in the proper county, and delivers the peti-

7. Con. Ord. 493.

8. Sec. 3.

9. Sec. 25.

1. Con. Ord. 494.

2. Con. Ord. 499.

3. 29 Vic. c. 25, s. 4.

tion to the proper Referee. To enable him to do this the person filing the petition endorses on it the name of the Referee before whom he wishes the investigation to be had,⁴ and where no Referee's name is endorsed the petition is sent to one of the Toronto Referees in rotation.⁵

To facilitate proceedings in the case of petitions referred to Local Masters, the Toronto Referees have also been appointed Inspectors with the powers conferred by the 25th & 26th sections of the act, and the Local Master, after investigating the title and being satisfied that the petitioner is entitled to a certificate, forwards the deeds, evidence and other papers to the Inspector whose name is endorsed on the petition, who examines the same, and should he find any defect, corresponds with the Local Master, and has the defect remedied before a Judge is attended with the petition and papers for approval.⁶

The petition, where the reference is to a Local Master, must be entered with the Inspector whose name is endorsed before it is filed, and the Inspector writes on it the day on which it is so entered, and then delivers it to the solicitor to be filed, or if it is already stamped sends it to the Clerk of Records and Writs.⁷

Any number of lots or parcels belonging to the same person, and dependant on one and the same chain of title, may be included in one petition, but two or more properties dependant on separate and distinct titles cannot be so included.⁸

A loose and indefinite description of the property as

4. Con. Ord. 495.

5. Con. Ord. 498.

6. Con. Ord. 507.

7. Con. Ord. 497.

8. Con. Ord. 492.

"part of Lot ——" not saying what part, should be avoided. If the land has been for some time in the occupation of any person, it may be proper to state "now and for some time occupied by ——." So if it adjoins any well known property, or property occupied by some public company, it may be advisable to describe it as so adjoining.

In the body of the petition the description should be as certain as in a conveyance, to identify the land claimed with the Registrar's Certificate and in order that the certificate of title may follow it. For the same reasons the petition should correctly describe the estate or interest in the lands claimed by the petitioner.

The fifth section of the act specifies the particulars by which the application is to be supported. These should not be laid before the Referee piecemeal, but the solicitor should, before producing any of them, obtain all the necessary affidavits and certificates proving possession of the land to have gone with the ownership, the heirship of parties claiming by descent, the death of parties entitled to dower, or tenancy by the curtesy, that the land is not chargeable with any crown debts, or with certain debts only, that all taxes on the land have been paid up to the first day of January next preceding the filing of the petition, that there are no writs of execution in the Sheriff's hands against any person interested in the land, and that the land has not been sold for taxes within eighteen months preceding the filing of the petition, or under execution within six months preceding. The affidavit of the petitioner should cover all these points, although other evidence is also necessary for the purpose of proving the facts.

Where the County Registrar is unable from the description of the property to certify that the memorials mentioned are all that affect the land, a Surveyor or

other competent person should examine the property, and after examining the registry books, make an affidavit that the memorials produced are all those that affect the land.

Where any of the deeds are lost or cannot be produced, the same evidence of their loss and contents must be given as on a trial at law, before secondary evidence can be received. Proof of search for the missing deeds must be given, and an affidavit of search by the petitioner himself is insufficient.⁹

Where the title is derived through a sale for taxes, the affidavit must show that all the requirements of the statute have been strictly complied with. Where the petitioner's title was acquired within two years before the filing of the petition, the Sheriff's certificate should be obtained as to executions against the prior owner, as any such executions, if duly revived would be binding on the lands.¹

By the evidences of title, spoken of in the first sub-section of the fifth section, is meant specially, written documents other than title deeds, not proofs of facts, which are provided for by the fifth sub-section.

The second sub-section shews that the particulars to support the application cannot be delivered to the Referee until the certificate of filing has been registered, as before that certificate is registered a certified copy of all memorials "up to the time of the registering of a certificate cannot be procured."² Where a petitioner intends to use certified copies of memorials as evidence, he must also produce certified copies of the affidavits of execution.

⁹ Re Chamberlain, 2 Chan. Cham. R. 352.

¹ Re Lyons, 2 Chan. Cham. R. 357.

² Re Hill, 2 Chan. Cham. R. 348.

The concise statement of facts spoken of in the fourth sub-section, is intended to embrace all facts necessary to make out the title, and which do not appear on the documents produced,—as title by length of possession, marriages, deaths, descents, &c., dates being given in all cases where possible.

The proof of facts to which sub-section five refers, such as length of possession, marriages, deaths, loss of deeds, searches for them and their contents, should accompany the deeds when delivered to the Referee, unless evidence *viva voce* has to be given.

The petition must be supported by the affidavit or deposition³ of the person whose title is to be investigated, and a certificate from his counsel or solicitor;⁴ but the Judge may in his discretion dispense with the affidavit, or permit it being made by some other person, or he may admit an affidavit as to part by the one, and as to part by another.

The affidavit or deposition of the owner must state,⁵ that to the best of his knowledge and belief he is the owner of the estate or interest claimed by the petition, subject only to the charges or incumbrances mentioned in it or in the schedule thereto, or that there is no charge or incumbrance affecting the land; that the deeds or evidence of title produced, are all that are in his possession or power; and that he is not aware of the existence of any claim adverse to or inconsistent with his own, to any part of the land or to any interest therein; or if he is aware of any adverse claim he must set it forth; and depose that he is not aware of any claim except what he sets forth. The affidavit must also state whether any one is in possession, and under what claim, right or title, and that to the best of the deponent's knowledge

3. Sec. 6.

4. Sec. 7.

5. Sec. 8.

and belief the affidavit or deposition, and the other papers produced, fully and fairly disclose all facts material to the title he claims, and all contracts and dealings which affect the same or any part thereof, or give any right as against the petitioner. He must also state whether he is married or not.

The certificate of the counsel or solicitor to accompany the petition, should state,⁶ that he has investigated the title and believes the applicant to be the owner of the estate claimed by the petition in the land in question, subject only to the charges and incumbrances, (if any,) set out in the petition or schedule thereto; or that he so believes subject to any condition, qualification or exception set out in the certificate. It must further state that he has conferred with the deponent on the matters set forth in the affidavit or deposition already referred to, and that he believes the affidavit or deposition to be true.

The various proofs required to support the petition, may be in the form of affidavits or certificates, or given *viva voce*;⁷ or in any other manner or form that the Judge deems satisfactory under the circumstances; and the Judge may act⁸ upon any evidence now received by any of the Courts on a question of title; and any evidence which the practice of English Conveyancers authorizes to be received on the investigation of a title out of Court; or any other evidence, whether the same be or be not receivable or sufficient in point of strict law, or according to the practice of English Conveyancers, provided it satisfies the Judge of the truth of the facts intended to be made out thereby.

As a general rule the evidence should include not

6. Sec. 8.

7. Sec. 10.

8. Sec. 9.

only what a purchaser's solicitor would satisfy himself of by search and enquiry according to the rules laid down by Conveyancers, but what is necessary for a vendor to produce to a purchaser on the strictest investigation of a title; and every material fact which is capable of being proved by independent evidence, must be so proved ⁹

Better evidence is necessary than would prevail in an action of ejectment; the petitioner is therefore often required to furnish evidence which would be elicited by adverse proceedings, to prove or disprove facts, which were he a party litigant, it would be the business of his opponent to negative or establish.

Where the Judge is not satisfied with the evidence of title produced in the first instance, he may give a reasonable opportunity of producing further evidence, or of removing defects in the evidence produced.¹

In every case, before a certificate or conveyance is granted, a notice either of the application being made, or of the Judge's order or decision thereon, must be published in the Canada Gazette, and if the Judge thinks proper in any other newspaper or newspapers for such period or periods as he thinks expedient; and the certificate or conveyance is not to be signed or executed until after the expiration of four weeks from the first publication of the notice.²

The notice is prepared by the Referee and in addition to the publication in the Gazette and newspapers, a copy is to be put up (for not less than four weeks), on the door of the Court House of the County in which the land lies, and in some conspicuous place in the Post Office which is situate nearest the property, unless the

9. *Re Chamberlain*, 2 Chan. Cham. R. 353.

1. Sec. 11.

2. Sec. 12.

Post Office is situated in a city.³ Proof of these notices having been posted up and continued for the period directed by the Referee must be produced.⁴

Where the Judge is satisfied respecting the title, and considers that the certificate can safely be granted without any further notice of the application than those already referred to, he may grant the certificate accordingly;⁵ but if there appears to exist any claim adverse to or inconsistent with that of the petitioner to or in respect of any part of the land, such notice as the Judge deems necessary is to be mailed or served on the adverse claimant, his solicitor, attorney or agent;⁶ and in all cases the Judge may, before granting a certificate, require any further publication, or any other notice to be mailed or served, that he deems necessary.⁷

The provisions of the act as to the effect of a certificate of title are so stringent that the Court exercises very great particularity in seeing that all persons entitled to notice have been duly and regularly served, and that strict proof of such service be given.⁸ Where there is any doubt whether some person other than the petitioner may not be interested in the property, notice should be given; and the same should be done where the title is not a clear paper title, proved by production of the original deeds.

If the petitioner's title rests on the Statute of Limitations, notice should be given to the person whose right is said to be barred, as in various ways the effect of the statute may be defeated.⁹

3. Con. Ord. 504.

4. *Re Hill*, 2 Chan. Cham. R. 848.

5. Sec. 13.

6. Sec. 14.

7. Sec. 15.

8. *Re Palmer*, 2 Chan. Cham. R. 351.

9. *Re Chamberlain*, 2 Chan. Cham. R. 352.

So where secondary evidence is given by production of a memorial and affidavit of execution, if the memorial is not in full and not signed by the grantor, notice should be given to the grantor.

In the case of a title derived under a sale for taxes, the person who but for the sale would be owner, should have notice of the proceedings, and as a general rule where the registry shews a conveyance from a person through whom the petitioner does not claim, and who on registry has no apparent title, notice should be given to the grantee. A discretion should, however, be exercised in giving notice, to avoid, on the one hand, doing injustice to some person probably interested, and on the other hand, putting the petitioner to unnecessary expense. Proof is indispensable either that possession has always accompanied the title under which the petitioner claims, or that some sufficient reason exists for not adducing such proof.¹

Any person who has an adverse claim, or a claim not recognized in the petition, may at any time before the certificate is granted file and serve on the claimant, his solicitor or agent, a short statement of his claim,² which must be verified by affidavit.³

In the case of a contest, the Judge may decide the question on the evidence before him, or may refer the same, or any matter involved therein, to the full court, or to any mode of investigation usual in other cases, or which he deems expedient, and may defer granting a certificate, according as the circumstances of each case render just and expedient.⁴

One certificate of title may be given comprising all

1. *Re Wright*, 2 Chan. Cham. R. 355.

2. Sec. 19.

3. Sec. 20.

4. Sec. 21.

the land mentioned in the petition, or separate certificates as to the title of separate parts of the land.⁵ Where an erroneous certificate was issued, but not registered, and no deed or incumbrance had since been made affecting the land, an application on petition for the issuing of a proper certificate was granted *exparte*.⁶

The certificate may be in the form prescribed in the schedule to the act, under the Seal of the Court, signed by one of the Judges, and by the Registrar, and with the schedule (if any), or a duplicate or counterpart, is to be registered in full both in the Court of Chancery and in the Registry Office of the County where the land lies, without any further proof.⁷

The certificate when so sealed, signed and registered, is made by the act conclusive at law and in equity and the title therein mentioned is to be deemed absolute and indefeasible, from the day of the date of the certificate, as regards Her Majesty and all persons whatever, subject only to any charges or incumbrances, exceptions or qualifications mentioned therein, or in the schedule thereto, and is to be conclusive evidence that every application, notice, publication, proceedings, consent and act whatsoever, which ought to have been made, given and done previously to the granting of the certificate, has been made, given and done by the proper parties;⁸ and a copy of the certificate purporting to be signed and certified as such, by the Registrar in Chancery, or by the Registrar for the County in which the land lies, is to be admissible evidence of the certificate for all purposes without further evidence of the copy, and without accounting for non-production of the original.⁹

5. Sec. 27.

6. *Bradley v. McDonell*, 2 Chan. Cham. R. 274.

7. Sec. 28.

8. Sec. 30.

9. Sec. 31.

Every claim of title under the act, and every certificate is to be presumed subject to the following exceptions and qualifications, unless the petition for investigation expressly alleges the contrary :¹

" 1. The reservations (if any) contained in the original grant from the Crown ;

2. Any municipal charges, rates or assessments theretofore imposed for local improvements, and not yet due or payable ;

3. Any title or lien which, by possession or improvement, or other means, the owner or any person interested in any adjoining land has acquired to or in respect of the land mentioned in the certificate ;

4. Any lease or agreement for a lease, for a period yet to run, if not exceeding three years, where there is actual occupation under the same."

Where the petitioner desires to obtain a certificate declaring the title free from such particulars, or any of them, his petition is to state so, and the investigation is to proceed accordingly.²

When land is sold under a decree of the Court of Chancery, the Court may order the title to be investigated with a view to granting an indefeasible title, and where such an investigation is had, a conveyance to the purchaser in the form prescribed by the act, under the seal of the Court, and purporting to be made in pursuance of the act, is to have the same conclusive effect as a certificate.³ And where a decree is made for specific performance of a contract for the sale of an estate, and it is part of the contract that the purchaser should have an indefeasible title, the Court may make the same investigation, and grant a similar conveyance.⁴

1. Sec. 17.

2. Sec. 18.

3. Secs. 32, 33.

4. Sec. 34.

After a certificate is granted under the act, any person aggrieved thereby may, on petition, and after satisfactorily accounting for the delay, have the title or claim re-investigated, on such terms as may seem just;⁵ but no proceeding on such a petition is to affect the title of any person who, in the meantime, and after the registration of the certificate, has acquired by sale, mortgage or contract, for valuable consideration, any estate or interest in the land specified in the certificate.⁶

Proceedings under the act are not abated or suspended by any death or transmission or change of interest, but in any such event the Court or Judge may require notices to be given to persons becoming interested, or make any order for discontinuing, or suspending, or carrying on the proceedings, or otherwise in relation thereto, as under the circumstances may be just;⁷ and no petition, order, affidavit, certificate, registration or other proceeding under the act is to be invalid by reason of any informality or technical irregularity therein, or of any mistake not affecting the substantial justice of the proceeding.⁸

At any stage of the matter, the Judge may order security for costs to be given by the applicant for a certificate, or by any person making an adverse claim;⁹ and may order costs either as between party and party, or as between solicitor and client, to be paid by or to any person, party to any proceeding, and may give directions as to the fund out of which any costs are to be paid.¹

With the leave of the Judge a petition may be with-

5. Sec. 42.

6. Sec. 43.

7. Sec. 44.

8. Sec. 45.

9. Sec. 23.

1. Sec. 23.

drawn at any time before final adjudication, on payment of all costs incurred in the investigation either by the petitioner or by any adverse claimant.²

In case any person who, if not under disability, might have made any application, given any consent, or done any act, or been party to any proceeding under the act, is a minor, an idiot or a lunatic, the guardian of the minor, or committee of the estate of the idiot or lunatic, may make such application, give such consent, do such act, and be party to such proceedings as such person might, if free from disability, have made, given, done or been party to, and is to represent such person for the purposes of the act: and if the minor has no guardian, or the idiot or lunatic no committee of his estate, the Court or Judge may appoint a person with like power to act for the minor, idiot or lunatic; but a married woman is, for the purposes of the act, to be deemed a *feme sole*.³

Nothing in the act is to entitle any person to refuse to answer any question or interrogatory in any civil proceeding in any Court of Law or Equity, but no answer to any such question or interrogatory shall be admissible in evidence against any person in any civil proceeding.⁴

2. Sec. 24.

3. Sec. 41.

4. Sec. 51.

APPENDIX.

29TH VIC. CAP. XXV.—AN ACT FOR QUIETING TITLES TO REAL ESTATE IN UPPER CANADA.

WHEREAS it is expedient to give certainty to the title to real estate, in Upper Canada, and to facilitate the proof thereof; and also to render the dealing with land more simple and economical: Therefore, her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

I. Any owner of an estate in fee simple in land in Upper Canada, or any trustee for the sale of the fee simple, shall be entitled to have his title judicially investigated and the validity thereof ascertained and declared; and he shall be so entitled whether he has the legal estate or not, and whether his title is subject or not to any charges or incumbrances.

The principal objects sought to be attained by this Act, are the giving greater certainty to titles, and by facilitating the proof of them to render the dealing with land simple and less expensive. As the law stood before the passing of this Act, an owner of land might have an indisputable title, every link in the chain of which he could easily prove, but he had no certainty that when years after he might be called upon to prove his title, he could do so. Title deeds might in the meantime be lost, or accidentally destroyed, witnesses might die, or important facts might have escaped from their memories. Even if his title was in any way attacked, he had in most cases only an opportunity of showing his legal title. In an action at law, questions of the equitable title or of equitable interests in the property are rarely touched, and whatever the result of the action may be, it is binding only upon the parties to the action. If repeated actions are brought, the same steps have to be gone through, and the same evidence adduced in each action.

Besides, many of the defects in a title, are such that if known of in

time, they can easily be remedied, but are incurable after the lapse of some years. The original parties to the transaction may be dead, and their heirs, minors or unknown, so that confirmation deeds cannot be got. Or those who are in a position to take advantage of the defect, may be tempted to do so, by a rise in the value of the property.

This Act is intended to remedy these evils as far as possible, by permitting any owner of land to have his title submitted to judicial investigation, and adjudicated upon, even though no hostile claim is being made.

When the owner has established his title, after due enquiry and every precaution on the part of the Court against error or fraud, he is to be entitled to a certificate, which is to be conclusive against every person, that at its date the person named in it was the owner of the property, and which is intended to be a new starting point for his title.

By this means, in the case of every person who has the wisdom to take advantage of the Act, the dealing with his property will be a matter of great simplicity.

Where a certificate of title has been obtained under this Act, many of the questions arising on every title will be avoided. An intending purchaser need not enquire into the genuineness of the various deeds, or as to their due execution: all doubt as to the sufficiency of any will forming a link in the title, or the capacity of the testator when he executed it, will be set at rest. Where married women have been the grantors, there will be no need for enquiry as to whether they were duly examined as required by law, and certificates of the fact in due form endorsed on the deeds. He knows that these and all similar questions have been submitted to a close and careful scrutiny, and satisfactorily established.

All reasonable precautions are provided by the Act to prevent the possibility of injustice. Before a certificate of indefeasible title is granted, the Court is to make, either itself or by a competent officer acting under the supervision of a Judge, a thorough examination of all the deeds and evidences of title which are in the possession or power of the petitioner; the Registry office must be carefully searched, and copies of all memorials relating to deeds, the originals of which cannot be found, must be produced. The petitioner must make an affidavit that he knows of no adverse claim, and his solicitor or counsel must certify that he has examined the title and conferred with the applicant, and that he believes the title to be a good one, and the affidavit true.

Notice of the application is also to be given, not only to any one who may appear to have an adverse claim, but to any one the Judge

may think should have notice of the proceedings. Notice is also to be published in the *Gazette*, and other newspapers, so that if there is any claimant, whose title does not appear on Registry nor in the deeds, and who is unknown to the petitioner or his advisers, he may, if possible have notice of what is going on, and have an opportunity of asserting his rights.

Where a petitioner in proceeding under this Act, makes out his title satisfactorily, he is entitled to a certificate unless the title can be successfully impeached at law or in equity; and if a bill filed by the contestant impeaching the transaction, by which the claimant's title arose, could be successfully resisted by claimant on any ground, it will form no obstacle to a certificate being granted to the claimant. *Laing v. Matthews*, 14 Gr. 36.

If the opposing claim is such that had a bill been filed by the party entitled to enforce it, the claimant would have had a good defence as a *bona fide* purchaser for value without notice, the claimant will be entitled to a certificate of title, *Cochrane v. Johnston*, 14 Gr. 177.

II. Any other person who has any estate or interest, legal or equitable, in or out of land in Upper Canada, may also apply for the investigation of his title and a declaration of the validity thereof; but it shall be in the discretion of the Judge by or before whom the proceedings are taken, to grant or refuse the application for the investigation; and such discretion may be invoked and exercised at any stage of the proceedings, and the decision of the Judge in exercising such discretion shall be subject to appeal like any other decision.

III. The application shall be to the Court of Chancery or any Judge thereof, and may be by a short petition in the form given in Schedule A.

The solicitor should carefully and thoroughly investigate the title and the evidence which can be adduced in support of it before filing the petition. If on such investigation he discovers an insurmountable defect, or that the evidence on any material point is unattainable, he should not file the petition, as the registration of a petition as required by the Act, without any certificate following it, will form a cloud upon the title. When the solicitor has examined the title and found it perfect, he should prepare the petition, following the form given by the Act, which should strictly be followed, and varied only in special cases.

The filing of a petition is not such a proceeding as will save the rights of a party contestant, otherwise barred by the Statute of Limitations, *Laing v. Avery*, 14 Gr. 33.

IV. A certificate by the Registrar of the said Court, of the petition being filed, shall be registered in the Registry Office of the County in which the land lies, and this certificate may be in the form given in Schedule B.

V. The application shall be supported by the following particulars :

1. The title deeds (if any) and evidences of title relating to the land that are in the possession or power of the applicant ;

2. A certified copy of the memorials of all other registered instruments affecting the land, or of all since the last judicial certificate, if any under this Act, was given (as the case may be), up to the time of the registering of a certificate of the petition as provided for by section four ;

3. The certificate of the Registrar of the County in which the land lies, as to bills and proceedings in Chancery or in any County Court on its equity side, relating to the land, and of which a certificate has been registered in his office ;

4. A concise statement of such facts as are necessary to make out the title, and which do not appear in the produced documents ; but no abstract of produced documents shall be required, except on special grounds ;

5. Proofs of any facts which are required to be proved in order to make out the title, and which are not established by the other produced documents, unless the Judge shall dispense with such proofs until a future stage of the investigation ;

6. An affidavit or deposition by the person whose title is to be investigated and a certificate of one of his Counsel or Solicitors, to the effect hereinafter respectively mentioned, unless the Judge sees fit, for some special reason, to dispense with the same respectively ;

7. A Schedule of the particulars produced under the preceding six subsections.

The solicitor should, before any proofs are laid before the Master or other Referee, obtain all the necessary affidavits proving possession of the land to have gone with the ownership, the heirship of parties claiming by descent, the death of parties entitled to dower, or tenancy by the curtesy, that the land is not chargeable with any Crown debts, or with certain debts only, that all taxes on the land have been paid up to the first of January next preceding the filing of the petition, that there are no writs of execution in the Sheriff's hands against any person interested in the land, and that the land has not been sold for taxes within eighteen months preceding the filing of the petition, or under execution within six months preceding.

Proof is indispensable either that possession has always accompanied the title under which the petitioner claims—or, that some sufficient reason exists for not adducing such proof, *Re Wright*, 2 Chan. Cham. R. 355.

Where the petitioner's title was acquired within two years before the filing of the petition, the Sheriff's certificate is required as to executions against the prior owner, as any such executions, if duly renewed, may be binding on the land, *R. Lyons*, 2 Chan. Cham. R. 357.

Where the Registrar is unable, from the description of the property, to certify that the memorials mentioned are all that affect the land, a Surveyor or other competent person should examine the property, and after examining the Registry books, should make an affidavit that the memorials produced are all those that affect the land.

Where the deeds are lost or cannot be produced, the same evidence of their loss and contents must be given as on a trial at law, before secondary evidence can be received.

Where the title is derived through a Sheriff's sale for taxes, the affidavit must shew that all the requirements of the Statute have been strictly complied with.

By evidences of title, in the first clause, is meant especially written documents other than title deeds; not proofs of facts, which are provided for by clause five.

Where a deed is executed under a power of attorney, the power of attorney must be produced, or secondary evidence of it given, as in the case of any other title deed, and evidence should be furnished that at the time when the power was acted upon, the owner was alive; except in cases coming under the 29 Vic. c. 28, ss. 23, 24.

Clause two shews that until the certificate of filing the petition is registered, the particulars to support the application cannot be delivered to the Referee, for prior to the registering the certificate a certified copy of all memorials "up to the time of registering the certificate" cannot be procured, see *Re Hill*, 2 Chan. Cham. R. 348.

If a petitioner intends to use certified copies of memorials as evidence, he must also procure and produce certified copies of the affidavits of execution.

The concise statement of facts spoken of in clause four, is intended to embrace all facts necessary to make out the title, and which do not appear on the documents produced—as title by length of possession, deaths, descents, &c., dates being given in all cases where possible.

The proof of facts referred to in clause five, such as length of possession, marriages, deaths, loss of deeds, searches for them and their contents, should accompany the deeds when delivered to the Referee, unless *viva voce* evidence has to be given.

Where the wife of a grantor does not join in a conveyance, evidence should be given that the grantor was unmarried, or that dower is barred by time or otherwise.

The word Judge, in sub-section 6, includes Referee, see secs. 25, 52.

VI. The affidavit or deposition of the person whose title is to be investigated, shall state to the effect, that to the best of his knowledge and belief he is the owner of the estate or interest (whatever it is) which is claimed by the petition, subject only to the charges and incumbrances set forth in the petition or in the schedule thereto, or that there is no charge or incumbrance affecting the land; that the deeds and evidences of title which he produces, and of which a list is contained in the Schedule produced under the preceding section, are all the title deeds and evidences of title relating to the land that are

in his possession or power, and that he is not aware of the existence of any claim adverse to or inconsistent with his own to any part of the land or to any interest therein, or if he is aware of such adverse claim, he shall set forth every such adverse claim, and shall depose that he is not aware of any except what he sets forth; and the affidavit or deposition shall also set forth whether any one is in possession of the land, and under what claim, right or title; and shall state that to the best of the deponent's knowledge, information and belief, the said affidavit or deposition, and the other papers produced therewith, fully and fairly disclose all facts material to the title claimed by the Petitioner, and all contracts and dealings which affect the same or any part thereof, or give any right as against the applicant.

If there is more than one petitioner, all should join in the affidavit, or some reason be assigned why they do not.

Where property is claimed by or on behalf of a wife under a conveyance made to her during coverture, an explanation of the transaction should be given on oath to shew that it was *bona fide*, and was such that the husband's creditors could have no claim on the property; the affidavits for this purpose should be by the claimants, and should be satisfactorily corroborated by disinterested persons of known credibility, *Re Lyons*, 2 Chan. Cham. R. 357.

VII. This affidavit or deposition may, in a proper case, be dispensed with, or may be made by some other person instead of the person whose title is to be investigated, or an affidavit or deposition as to part may be made by the one, and as to part by another, at the discretion of the Judge to whom the application is made; and in such case, the affidavit shall be modified accordingly.

See sections 25 & 52 as to the powers of a Referee.

VIII. The certificate of the Counsel or Solicitor shall state to the effect, that he has investigated the title and believes the party to be the owner of the estate which the petition claims in the land in question, subject only

(if such be the case) to any charges or incumbrances that may be set forth in the Schedule to the petition ; or that he so believes, subject to any condition, qualification or exemption to be set forth in the certificate), and that he has conferred with the deponent on the subject of the various matters set forth in the affidavit or deposition referred to in the preceding two sections, and believes the affidavit or deposition to be true.

IX. The Judge in investigating the title may receive and act upon any evidence that is now received by any of the Courts on a question of title ; and any evidence which the practice of English Conveyancers authorizes to be received on an investigation of a title out of Court ; or any other evidence, whether the same be or be not receivable or sufficient in point of strict law, or according to the practice of the English Conveyancers, provided the same satisfies the Judge of the truth of the facts intended to be made out thereby.

As a general rule the evidence should include not only what a purchaser's solicitor would satisfy himself of by search and enquiry according to the rules laid down by Conveyancers, but also what is necessary for a vendor to produce to a purchaser on a strict investigation of title. Higher evidence is necessary than such as would merely prevail in ejectment. There are erroneous judgments upon defective or unsound evidence which may be cured by another ejectment ; but if the doubts upon a title should after completion ripen into defects, the purchaser may find it impossible to regain the position which he held before the contract. Thus a seven years' absence without tidings, though it prevails as evidence of death in ejectment, is clearly insufficient between vendor and purchaser, that the title is good against all the world, and not merely sufficient to prevail against certain contending parties.

A vendor may therefore be required to furnish evidence which would be elicited by adverse proceedings, to prove or disprove facts, which, if he were a party litigant, it would be the business of his opponent to negative or establish.

Every material fact which is capable of being proved by independent evidence, ought to be proved ; thus it is necessary to prove

search for missing deeds; an affidavit by the petitioner himself as to the search is not sufficient, *Re Chamberlain*, 2 Chan. Cham. R. 352.

Where there is any doubt whether some person other than the petitioner may not be interested in the property, notice should be given; and the same should be done where the title is not a clear paper title, proved by the production of the original deeds.

If the purchaser's title rests on the Statute of Limitations, notice should be given to the person said to be barred, as in various ways, as by acknowledgment of title, the effect of the statute may be defeated, *Re Chamberlain*, 2 Chan. Cham. R. 352.

So where secondary evidence is given by production of a memorial and affidavit of execution, if the memorial is not in full and not signed by the grantor, notice should be given to the grantor.

In the case of a title derived under a sale for taxes, the person who but for the sale would be the owner, should have notice of the proceedings, and as a general rule, where the registry shews a conveyance from a person, through whom the petitioner does not claim, and who on registry has no apparent title, notice should be given to the grantee. The Referee must, however, in giving notice, exercise a discretion, to avoid, on the one hand, doing injustice to some person probably interested, and on the other hand putting the petitioner to unnecessary expense.

The Referee has the same powers as a Judge, see secs. 25 & 52.

X. The proofs required may be by, or in the form of, affidavits or certificates; or may be given *viva voce*; or may be in any other manner or form that under the circumstances of the case is satisfactory to the Judge in regard to the matters to which the same relate.

Frequently title deeds are lost or destroyed, and the party claiming under them is desirous of giving secondary evidence of their contents, and in such a case, before this secondary evidence can be received, evidence of search in the proper quarter and proof of their destruction must be given. It is always important, and sometimes essential, to shew that possession has gone with the deeds.

Where the patent is not produced, an exemplification or a certified copy must be got.

XI. If the Judge is not satisfied with the evidence of title produced in the first instance, he shall give a rea-

sonable opportunity of producing further evidence, or of removing defects in the evidence produced.

XII. Before giving a certificate or conveyance under this Act, the Judge shall direct to be published in the *Canada Gazette*, and if he sees fit in any other newspaper or newspapers, and in such form and for such period or periods as the Judge thinks expedient a notice either of the application being made, or of the order or decision of the Judge thereon; and the certificate or conveyance shall not be signed or executed until after the expiration of at least four weeks from the first publication of such notice, or such other period as the Judge may appoint.

XIII. When the Judge is satisfied respecting the title, and considers that the certificate of title can safely be granted without any other notice of application than the published notice so required he shall grant the certificate accordingly.

Where a Referee finds in favour of a title acquired by adverse possession, against the legal paper title, his certificate should show of what portion of the lot the claimant has been in possession; as by occupation of one or more acres of a wild lot of land, a party will not acquire title to the whole lot, but only to so much as he is in actual possession of, *Low v. Morrison*, 14 Gr. 192.

Where a title by possession is relied on, notice of the application must, under the direction of the Referee, be given to the persons who but for such possession would be the owners, unless it is shown that due enquiry has been made for such persons without success, *Re Chamberlain*, 2 Chan. Cham. R. 352.

As to the duty of the Referee, see Chan. Con. Ord. 503, 504.

XIV. In case of there appearing to exist any claim adverse to or inconsistent with that of the Petitioner to or in respect of any part of the land, the Judge shall direct such notice as he deems necessary to be mailed to or served on the adverse claimant, his solicitor, attorney, or agent.

The word Judge includes Referee

The effect of a certificate under this Act is so stringent that great particularity must be exercised by the Court in seeing that all parties entitled to notice have been duly and regularly served, and that strict proof of such service is given, *Re Palmer*, 2 Chan. Cham. R. 351.

Where the petitioner claimed the north-east part of a lot under a will devising the north-west part, and it was alleged that the word "north-west" was a clerical error in the will, all the parties interested in the opposite view were required to be served with notice of the application, signed by the Referee, unless a case was made for dispensing with service on some of them, *Re Lyons*, 2 Chan. Cham. R. 357.

XV. In all cases he may require from time to time any further publication to take place, or any other notice to be mailed or served, that he deems necessary before granting his certificate.

XVI. Before a certificate of title is granted, satisfactory evidence shall be given by certificate, affidavit or otherwise, that all taxes, rates and assessments, for which the land is liable, have been paid, or that all except those for the current year have been paid.

The Court has no jurisdiction to grant a certificate, unless all taxes except those for the current year have been paid, *Re Chamberlain*, 2 Chan. Cham. R. 352.

XVII. Every claim of title under this Act shall be presumed to be subject to the following exceptions and qualifications, unless the petition for investigation expressly alleges the contrary :

1. The reservations (if any) contained in the original grant from the Crown ;

2. Any municipal charges, rates or assessments theretofore imposed for local improvements, and not yet due and payable ;

3. Any title or lien which, by possession or improvement or other means, the owner or any person interested

in any adjoining land has acquired to or in respect of the land mentioned in the certificate ;

4. Any lease or agreement for a lease, for a period yet to run, of not exceeding three years, where there is actual occupation under the same.

XVIII. But if the applicant desires the certificate to declare the title to be free from the said particulars, or any of them, his petition shall so state, and the investigation shall proceed accordingly.

XIX. Any person having an adverse claim, or a claim not recognized in the applicant's petition, may at any time before the certificate of title is granted, file and serve on the applicant, his solicitor or agent, a short statement of his claim, which may be in the form set forth in Schedule C.

XX. This claim shall be verified by an affidavit to be filed therewith.

XXI. In case of a contest, the Judge may either decide the question of title on the evidence before him, or may refer the same or any matter involved therein to the full Court, or to any mode of investigation which is usual in other cases, or which he may deem expedient, and may defer granting the certificate until afterwards, according as the circumstances of each case render just or expedient.

Where the contestant having filed his claim verified by affidavit, and complied with the requirements of sections 19 & 20, does not take an appointment to proceed thereon, the petitioner ought to obtain a warrant from the Referee, on the return of which the Referee will regulate the course of proceeding and appoint a time for the claimant to proceed with the consideration of his title, and for the contestant to bring in and proceed upon his objections. At the time appointed the necessary evidence is to be adduced and the questions at issue argued.

XXII. The Judge may, at any stage of the cause, order security for costs to be given by the applicant for a certificate, or by any person making any adverse claim.

A contestant, served with notice, will not be prevented from asserting his rights until payment of costs of proceedings instituted by him against the claimant, in respect of the property in question, ordered to be paid by the contestant, *Shepherd v. Hayball*, 13 Gr. 681.

A Referee has the same power.

XXIII. The Judge may order costs either as between party and party, or as between solicitor and client, to be paid by or to any person, party to any proceeding under this Act, and may give directions as to the fund out of which any costs shall be paid.

See secs. 25 & 52, as to the powers of the Referee.

Costs do not follow as a matter of course on proceedings under this Act, *Low v. Morrison*, 14 Gr. 192; where a party having acquired title by adverse possession, institutes proceedings to quiet his title, he must establish his right at his own expense; and although such adverse title is established, he may be made to pay the costs of an unsuccessful contestant, *Ibid.*

XXIV. The Petitioner may, by leave of the Judge, withdraw his application at any time before final adjudication, on payment of all costs incurred in the investigation either by himself or by any adverse claimant.

XXV. With a view of expediting investigations, and subject to any general orders in this behalf, the Judge, if he sees fit, may refer any petition presented under this Act to the Master or a Deputy Master or any other officer of the said Court, or to any Counsel named by the Judge, and in such case the Referee shall proceed as the Judge himself should do under this Act, had the reference not been made, and shall have the same powers.

See Ord. 494, for the officers to whom petitions may be referred.

XXVI. The Judge may also refer any title to counsel

named by the Judge, for a preliminary report or examination, and may call for the assistance of counsel in any other way and for any other purpose that may tend to the despatch of business under this Act.

XXVII. The Judge may give one Certificate of title, comprising all the land mentioned in the Petition, or may give separate Certificates as to the title of separate parts of the land.

XXVIII. The certificate of title may be in the form contained in Schedule D to this Act, and shall be under the seal of the Court, and shall be signed by one of the Judges and by the Registrar of the Court, and the same and the Schedule (if any) thereto, or a duplicate or counterpart of the same, shall be registered in full, both in the Court of Chancery and in the Books of the Registry Office of the County where the land lies, without any further proof thereof.

XXIX. A memorandum or certificate of the registration may be endorsed on the certificate of title or on any counterpart or certified copy thereof thus :—

“Registered in Chancery, 186 , Book
 , Page , A. G. Registrar.”

Registered in the Registry Office for the County of
 , Book , Page , (Date) Registrar,”
 and a memorandum or certificate so signed shall be evidence of the registration mentioned therein.

XXX. The certificate of title when so sealed, signed and registered, shall be conclusive at law and in equity, and the title therein mentioned shall be deemed absolute and indefeasible, from the day of the date of the certificate, as regards Her Majesty and all persons whatever, subject only to any charges or incumbrances, exceptions

or qualifications mentioned therein, or in the Schedule thereto, and shall be conclusive evidence that every application, notice, publication, proceedings, consent and act whatsoever, which ought to have been made, given and done previously to the granting of the certificate, has been made, given and done by the proper parties.

XXXI. After a certificate of title is duly registered, a copy of the certificate, purporting to be signed and certified as such copy, by the Registrar in Chancery, or by the Registrar for the County in which the land lies, shall be admissible evidence of the certificate for all purposes whatsoever, without further evidence of such copy, and without accounting for the non-production of the certificate.

XXXII. In case of a Chancery sale, the Court of Chancery, if it thinks fit, may investigate the title with a view to granting an indefeasible title, and in that case, a conveyance executed to the purchaser under the seal of the Court and purporting to be under the authority of this Act, shall have the same conclusive effect as a certificate.

XXXIII. The conveyance may be in the form set forth in Schedule E to this Act.

XXXIV. Where a decree is made for the specific performance of a contract for the sale of an estate, and it is part of the contract that the vendor shall have an indefeasible title, the Court shall make the like investigation, and the conveyance may be in the form set forth in the same Schedule E.

XXXV. In case any person domiciled in Upper Canada, or claiming any real estate in Upper Canada, desires to establish, not his title to some specific property, but generally that he is the legitimate child of his parents, or

that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage, or that his own marriage was a valid marriage, or that he is the heir, or one of the co-heirs of any person deceased, or that he is a natural born subject of Her Majesty, he may, if the said Court thinks fit, have any of the said matters judicially investigated and declared.

XXXVI. The application may be by a short petition stating the object of the application.

XXXVII. The petition shall be supported by an affidavit of the applicant verifying the statements of the petition, and stating further that his claim is not disputed or questioned by any person; or if his claim is to his knowledge disputed or questioned, he shall set forth the facts in relation to such dispute or question, and shall depose that he is not aware of any dispute or question except what he has set forth, and he shall state in the affidavit such other facts as may satisfy the Court of the propriety of proceeding with the investigation.

XXXVIII. The investigation shall be made by the same judicial authority, and in the same manner, and on the same evidence, and the same publication or other notice shall be required, and the same proceedings generally shall be had, and the certificate granted on such investigation shall be registered in the same way, and may be proved by the same evidence, as nearly as may be respectively, as in cases under the first section of this Act.

XXXIX. This certificate when registered shall be conclusive and indefeasible in favor of the party on whose application the same was granted, and all persons claiming by, from, through or under him, and shall be *prima facie* evidence in favor of all other persons, and against all persons of the truth of the fact therein declared.

XL. A separate book shall be kept in Chancery for

the registering of these and other certificates of title, and conveyances given under this Act, and the certificates and conveyances registered therein shall be numbered in order, and convenient indexes to the book shall be kept in such form as the Court from time to time directs.

XLI. In case any person who, if not under disability, might have made any application, given any consent, or done any act, or been party to any proceeding under this Act, is a minor, an idiot or a lunatic, the guardian of the minor, or committee of the estate of an idiot or lunatic, may make such application, give such consent, do such act, and be party to such proceeding as such person might, if free from disability, have made, given, done or been party to, and shall otherwise represent such person for the purposes of this Act; and if the minor has no guardian, or the idiot or lunatic no committee of his estate, the Court or Judge may appoint a person with like power to act for the minor, idiot or lunatic; but a married woman shall, for the purposes of this Act, be deemed a feme-sole.

XLII. After a certificate is granted in regard to any of the matters investigated under this Act, any party aggrieved thereby may, on petition, and after satisfactorily accounting for his delay, have the title or claim re-investigated on such terms as may be just.

XLIII. But no proceeding on such petition shall affect the title of any person who, in the meantime, and after the registration of the certificate, shall have acquired, by sale, mortgage or contract, for valuable consideration, any estate or interest in the land specified in the certificate of title; or (in case the certificate was under the thirty-fifth section of this Act,) in any land or other property, the title to which was derived from, through or under the person named in the certificate, in the character which is thereby declared to belong to him.

XLIV. Proceedings under this Act shall not abate or be suspended by any death or transmission or change of interest, but in any such event the Court or Judge may require notices to be given to persons becoming interested, or may make any order for discontinuing, or suspending, or carrying on the proceedings, or otherwise in relation thereto, as under the circumstances may be just.

XLV. No petition, order, affidavit, certificate, registration or other proceeding under this Act shall be invalid by reason of any informality or technical irregularity therein, or of any mistake not affecting the substantial justice of the proceeding.

XLVI. An appeal shall lie from any order or decision of a Judge under this Act to the full Court, and from the full Court to the Court of Error and Appeals, as in the case of Orders, Decrees, Rules and Judgments, in suits.

An appeal to a Judge lies from the order of the Referee.

XLVII. The foregoing provisions of this Act shall be so construed and carried out, as to facilitate, as much as possible, the obtaining of indefeasible titles by the owners of estates in land, through the simplest machinery, at the smallest expense, and in the shortest time consistent with reasonable prudence in reference to the rights or claims of other persons.

XLVIII. If in the course of any proceeding under this Act, any person acting either as principal or agent, shall, knowingly and with intent to deceive, make, or assist or join in or be privy to the making of, any material false statement or representation, or suppress, conceal or assist or join in or be privy to the suppressing, withholding or concealing from the Court any material document, fact or matter of information, every person so acting shall be deemed to be guilty of a misdemeanor, and on convic-

tion shall be liable to be imprisoned in the Provincial Penitentiary for a term not exceeding three years, and not less than two years, or to be imprisoned in any other prison or place of confinement for any term less than two years, and in the latter case with or without hard labor, or to be fined such sum as the Court by which he is convicted shall award; any order or declaration of title obtained by means of such fraud or falsehood, shall be null and void for or against all persons other than a purchaser for valuable consideration without notice.

XLIX. If in the course of any proceeding before the Court, under this Act, any person shall fraudulently forge or alter, or assist in forging or altering, any certificate or other document relating to such land or the title thereto, or shall fraudulently offer, utter, dispose of or put off any such certificate or other document, knowing the same to be forged or altered, such person shall be guilty of felony, and upon conviction shall be liable, at the discretion of the Court by which he is convicted, to be imprisoned in the Provincial Penitentiary for life, or for any term not less than three years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years, and in the latter case with or without hard labor.

L. No proceeding or conviction for any act hereby declared to be a misdemeanor, shall affect any remedy which any person aggrieved by such act may be entitled to, either at law or in equity, against the person who has committed such act.

LI. Nothing in this Act shall entitle any person to refuse to answer any question or interrogatory in any civil proceeding in any Court of law or equity, but no answer to any such question or interrogatory shall be admissible in evidence against such person in any civil proceeding.

LII. The said Court may, from time to time, make general orders for referring all or any applications under this Act, to any Master, Deputy Master or other officer of the Court, or to any Counsel or other person appointed by the Court in that behalf, and to regulate the fees to be paid on such reference, and the Referee shall have the same powers as a Judge within the limits prescribed by such general orders; and the Court may also, from time to time, make other general orders for the purposes of this Act, and for regulating the practice under the same; and all general orders made in pursuance of this section may from time to time be rescinded or altered by the said Court.

SCHEDULE A.

IN CHANCERY.

Form of Petition for the Investigation, Sect. 3.

In the matter of *(the East half of lot No. in the
Concession in the Township of or as the case
may be, describing the property very briefly.)*

To the Honorable the Judges of the Court of Chancery.

The Petition of

SHREWETH,—

That your Petitioner is absolute owner in fee simple in possession *(or as the case may be,)* of the following property *(describing it).*

That there is no charge or other incumbrance affecting your Petitioner's title to the said land, *(except, &c., or,—that your Petitioner's title is subject only to the charges or incumbrances in the schedule hereto mentioned, and that the on'y persons having or claiming any charge, in-*

cumbrance, estate, right or interest in the said land are set forth in the schedule hereto annexed, and that the charge, incumbrance, estate, right or interest belonging to or claimed by each is therein set forth). Your Petitioner therefore prays that his title to the said land may be investigated and declared under the Act for quieting titles to real estate in Upper Canada.

(Signed), A. B.

or

C. D., Solicitor for A. B.

SCHEDULE B.

Form of Registrar's Certificate of an application under this Act, Sect. 4.

I certify that an application has been made by to the Court of Chancery, under the Act for quieting titles to real estate in Upper Canada, for a certificate of title to the following lands [*stating them.*]

ALEX. GRANT,
Registrar.

SCHEDULE C.

Form of an Adverse Claimant's Statement, Sec. 19.

In the matter of, &c., (*as in petition*).

A. B. of, &c., claims to be the owner of the said land, &c., &c., (*stating very briefly the nature of the claim and the grounds of it*). Dated this day of 186 .

(Signed), A. B.

or

C. D., Solicitor for A. B.

SCHEDULE D.

Form of Chancery Certificate of Title, Sec. 28.

No. —

These are to certify under the authority of the Act for quieting titles to real estate in Upper Canada, that A. B.

is the legal and beneficial owner in fee simple in possession (*or as the case may be*), of all, &c., [*here describe the property*], subject to the reservations mentioned in the seventeenth section of the said Act and therein numbered respectively one, two, three and four, (*or as the case may be*), and to (*specifying either by reference to a schedule or otherwise any of the other charges or incumbrances, exceptions or qualifications to which the title of A. B. is subject*) but free from all other rights, interests, claims and demands whatever. Or that [*stating the facts found and declared under the thirty-fifth Section of this Act, and stating on whose application the same are declared.*]

In Witness whereof [Chancellor or one of the Vice Chancellors,] of the said Court has hereunto set his hand, and the seal of the said Court has been hereunto affixed, this day of

A. GRANT, Registrar.

C. D.

L. S.

SCHEDULE E.

Form of Chancery Deed, Secs. 33 and 34.

No. —

The Court of Chancery for Upper Canada under the authority of the Act for quieting titles to real estate in Upper Canada, doth hereby grant unto A. B., &c., [*here*

describe the premises sold,] to hold the same unto the said
his heirs and assigns forever [*as the case
may be,]* subject to [*here specify as in the case of the
Chancery certificate of title.*]

In witness whereof [Chancellor, or one of the
Vice Chancellors of the said Court,] has hereunto set
his hand, and the seal of the said Court has been hereto
set, this day of , in the year
of our Lord,

A. GRANT, Registrar.

C. D.

L. S.

CONSOLIDATED ORDERS OF THE COURT OF CHANCERY RELATING TO QUIETING TITLES.

492. Under the Act for Quieting Titles to Real Estate in Upper Canada, the petition for an investigation of title is not to include two or more properties dependant on separate and distinct titles; but may include any number of lots or parcels belonging to the same person, and dependant on one and the same chain of title. (31st Aug. 1867; Ord. 1.)

In the petition a loose indefinite description of the property as "part of lot,—" not saying what part should be avoided. If the land has been for some time in the occupation of any person, it may be proper to state, "now and for some time occupied by——." So if it adjoins any well known property, or property occupied by some public company, it may be advisable to describe it as so adjoining.

In the body of the petition the description should be as certain as the conveyance, to identify the land claimed with the Registrar's certificate, and in order that the certificate of title may follow it. For the same reasons the petition should properly describe the estate or interest in the land claimed by the petitioner.

493. Where an application is made under the second section of the Act, the Clerk of Records and Writs is to

attend one of the Judges with the petition for directions, before the same is referred for investigation. (31st Aug. 1867; Ord. 2.)

The first section of the Act for Quieting Titles enables any owner of an estate in fee simple in land in Upper Canada, or any trustee for the sale of the fee simple to have his title judicially investigated. By the second section a Judge is given a discretion to permit "any other person who has any estate or interest, legal or equitable, in or out of land in Upper Canada," to apply for the investigation of his title, and a declaration of the validity thereof.

494. A petition under the Act may, at the option of the petitioner, be referred to any of the officers of the Court at Toronto, or to any conveyancing Counsel, who may from time to time be designated by the Court for the purpose; or to any of the following Local Masters, viz., the Masters at Barrie, Belleville, Brantford, Brockville, Cobourg, Cornwall, Goderich, Guelph, Hamilton, Kingston, Lindsay, London, Ottawa, Owen Sound, Peterborough, Sandwich, Sarnia, Simcoe, Stratford, St. Catharines, Whitby, and Woodstock; or to any other of the Local Masters who shall hereafter be designated. (31st Aug. 1867; Ord. 3.)

495. To facilitate the proceedings in cases referred to the Local Masters, one or more Inspectors of Titles will be named by the Court, for the purposes, and with the powers mentioned in and provided for by the 25th and 26th sections of the said Act; and on the petition are to be endorsed the names of the Inspector, or one of the Inspectors, as the case may be, and of the Local Master, thus: "To be referred to the Master at _____, and to Mr. _____, Inspector of Titles." (31st Aug. 1867; Ord. 4.)

496. Petitions filed unendorsed with the name of a Referee, are to be referred to the Referee in Toronto or to one of the Referees in Toronto (if more than one) in

rotation or otherwise as the Court from time to time directs; but a petition indorsed with the name of any Referee is to be referred to him accordingly, unless the Court otherwise directs. (31st Aug. 1867; Ord. 5.)

497. Where the petitioner desires the reference to a Local Master, the petition is to be entered with the Inspector of Titles before being filed as required by the Statute, and the Inspector is to note thereon the day of entering the same, adding to such note his own initials, and is thereupon to deliver the petition to the solicitor, or, if duly stamped, to the Registrar, to be filed. (31st Aug. 1867; Ord. 6.)

498. The Local Master shall be entitled to confer or correspond from time to time with the Inspector of Titles, for advice and assistance on questions of practice or evidence, or other questions arising under the Act or under these Orders. (31st Aug. 1867; Ord. 7.)

499. The Clerk of Records and Writs is to deliver to the party filing a petition under the Act, a certificate of the filing thereof, for registration in the proper County; and thereupon the petition is forthwith to be referred and delivered or posted by the Clerk of Records and Writs to the Referee named for that purpose. (31st Aug. 1867; Ord. 8.)

Until the certificate of filing the petition is registered the particulars required by sec. 5 of the Act cannot be delivered to the Referee, as until then certified copies of memorials "up to the time of the registering of a certificate of the petition" as required by sec. 5, sub-sec. 2, cannot be procured.

500. The particulars necessary under the fifth section of the Act to support the petition are to be delivered or sent by the petitioner or his solicitor to the Referee, and are to be forthwith examined and considered by him. (31st Aug. 1867; Ord. 9.)

See notes to 29 Vic. c. 25, s. 5.

501. In every case of an investigation of the title to property under the said Act, the petitioner is to shew, by affidavit or otherwise, whether possession has always accompanied the title under which he claims the property, or how otherwise, or is to show some sufficient reason for dispensing with such proof either wholly or in part. (31st Aug. 1867 ; Ord. 10.)

502. Where there is no contest, the attendance of the petitioner, or of any solicitor on his behalf, is not to be required on the examination of the title, except where, for any special reason, the Referee directs such attendance. (31st Aug. 1867 ; Ord. 11.)

503. If, on such examination as aforesaid, the Referee finds the proof of title defective, he is to deliver or mail to the petitioner or to his solicitor or agent, a memorandum of such finding, stating shortly therein what the defects are. (31st Aug. 1867 ; Ord. 12.)

504. When the Referee finds that a good title is shown, he is to prepare the necessary advertisement, and the same is to be published in the official *Gazette* and in any other newspaper or newspapers in which the Referee thinks it proper to have the same inserted ; and a copy of the advertisement is also to be put up on the door of the Court House of the County where the land lies, and, unless the nearest Post Office is in a city, in some conspicuous place in the Post Office which is situate nearest to the property the title of which is under investigation ; and the Referee is to endorse on the advertisement so prepared by him, the name or names of the newspaper or newspapers in which the same is to be published, and the number of insertions to be given therein respectively, and the period (not less than four weeks) for which the notice is to be continued at the Court House and Post Office respectively. (31st Aug. 1867 ; Ord. 13.)

One or at most two insertions in the *Gazette* will usually be sufficient.

Proof that the notices have been continued for the proper period is as necessary as proof of the original posting, *Re Chamberlain*, 2 Chan. Cham. R. 352; *Re Hill*, *Ibid*, 348.

505. Any notice of the application to be served or mailed under the fourteenth section of the Act, is to be prepared by the Referee; and directions are in like manner to be given by him as to the persons to be served with such notice, and as to the mode of serving the same. (31st Aug. 1867; Ord. 14.)

Sec. 14 requires, in cases where there appears to exist any claim adverse to or inconsistent with that of the petitioner to or in respect of any part of the land, that the Judge shall direct such notice as he deems necessary to be mailed to or served on the adverse claimant, his solicitor, attorney, or agent.

506. The Inspector, or Toronto Referee, is from time to time to confer with one of the Judges in respect of matters before such Inspector or Toronto Referee, as there shall be occasion. (31st Aug. 1867; Ord. 15.)

507. When any person has shewn himself, in the opinion of a Local Master, to be entitled to a certificate or conveyance under the Act, and has published and given all the notices required, the Master is to write at the foot of the petition, and sign, a memorandum to the following effect: "I am of opinion that the petitioner is entitled to a certificate of title (*or conveyance*) as prayed" (*or subject to the following incumbrances, &c., as the case may be*); and is to transmit the petition (if by mail the postage being prepaid,) with the deeds, evidence, and other papers before him in reference thereto, to the Inspector of Titles with whom the petition was entered; and the Inspector is to examine the same carefully, and should he find any defect in the evidence of title, or in the proceedings, he is, by correspondence or otherwise, to point the same out to the petitioner, or his solicitor, or

to the Master, as the case may be, in order that the defect may be remedied before a Judge is attended with the petition and papers for approval. (31st Aug. 1867; Ord. 16.)

508. When the Inspector, or other Referee (not being a Local Master,) finds that the petitioner has shewn himself entitled to a certificate of title, or a conveyance under the Act, and has published and given all the notices required, the Inspector or Referee (not being a Local Master,) is to write at the foot of the petition, and sign a memorandum to the same effect as is required from a Local Master, and is to prepare the certificate of title, or conveyance, and is to engross the same in duplicate, one being on parchment or parchment paper; and is to sign the same respectively at the foot or in the margin thereof; and is to attend one of the Judges therewith, and with the deeds, evidence, and other papers before him in reference thereto; and on the certificate or conveyance being signed by the Judge, the Inspector or other Referee aforesaid, as the case may be, is to procure the same to be signed by the Registrar, and registered; and the Clerk of Records and Writs is to deliver or transmit the same, when so signed and registered, to the petitioner, his solicitor or agent, for registration in the proper County. (31st Aug. 1867; Ord. 17.)

509. When a certificate of title or conveyance under the Act has been granted, the Inspector or Referee may, without further order, deliver, on demand, to the party entitled thereto, or his solicitor, all deeds and other evidences of title, not including affidavits made, and evidence given in the matter of the title; and is to take his receipt therefor. (31st Aug. 1867; Ord. 18.)

510. Every Inspector and other Toronto Referee is to keep a book, and to preserve therein a copy of all his

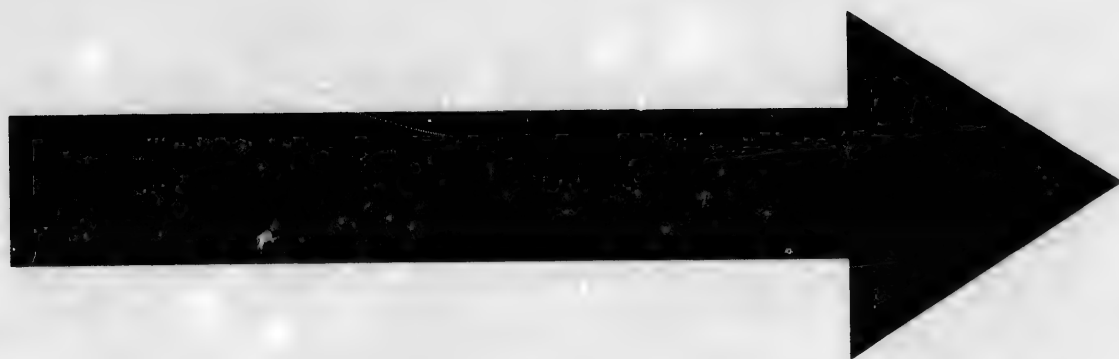
letters under these Orders, and is to prepare monthly, for the information of the profession, a memorandum of points of practice decided in matters under the Act. (31st Aug. 1867; Ord. 19.)

511. The fees of solicitors and counsel, and the fees payable by stamps, for proceedings under the said Act, are, respectively, to be the same as for like proceedings in suits. (31st Aug. 1867; Ord. 20.)

512. The Referee is, in lieu of all other fees, to be entitled to a fee of fifty cents for every deed in the chain of title, other than satisfied mortgages; and Referees who prepare the certificate or conveyance, are to have a fee of four dollars, for drawing and engrossing the same in duplicate. Besides these fees, the Referee is to have the same fees in respect of proceedings occasioned by any defects in the proof of title, which shall be mentioned in the Referee's memorandum referred to in Order 503, as are payable to the Master in respect of similar proceedings in suits. No further or other fee is to be payable to the Referee in respect of any of the proceedings by or before him under the said Act in an uncontested case. (31st Aug. 1867; Ord. 21.)

513. In a contested case, the Referee is, in addition, to be entitled, in respect of the proceedings occasioned by the contest, to the same fees therefor as are payable to him for the like proceedings in suits. (31st Aug. 1867; Ord. 22.)

514. The fee of the Inspector of Titles on entering the petition with him is eight dollars, and no further fee is to be paid him for correspondence, examination of the title, drawing or engrossing certificate or conveyance, or for any other matter or thing done under the petition. (31st Aug. 1867; Ord. 23.)



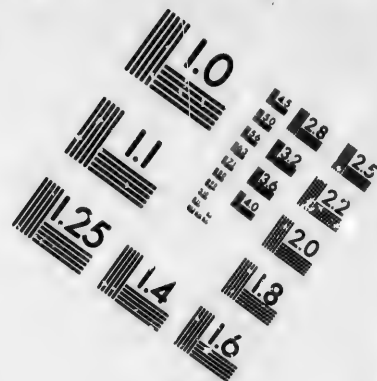
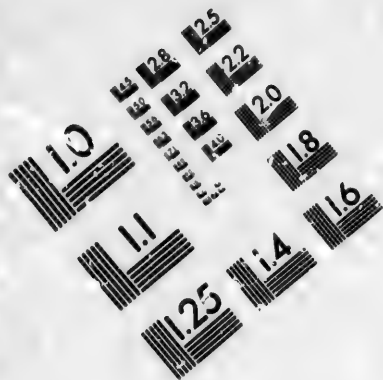
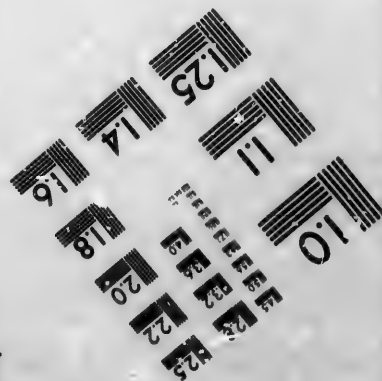
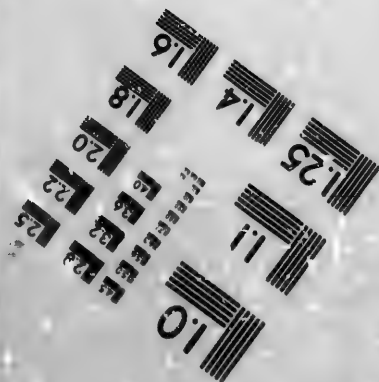
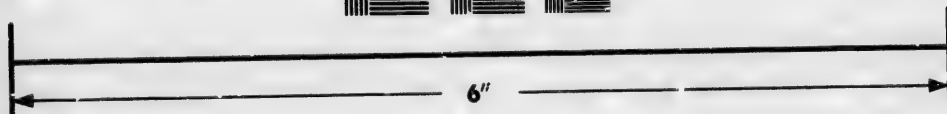
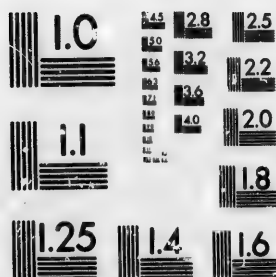


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155. The applicant or his solicitor is to pay, or prepay, as the case may be, all postages and other expenses of transmitting letters or papers. (31st Aug. 1867; Ord. 24.)

516 Petitions under the thirty-fifth section of the Act are to be filed and proceeded with in the same manner (as nearly as may be) as petitions for an indefeasible title, and the fees of officers, solicitors, and counsel, are to be the same as in respect of the like proceedings in suits. (31st Aug. 1867; Ord. 25.)

FORMS.

MEMORANDUM AS TO AFFIDAVITS, CERTIFICATES, &c., TO BE PRODUCED ON APPLICATIONS UNDER THE ACT FOR QUIETING TITLES.

The following are the papers which it is necessary to deliver to the Referee in all ordinary cases under the Act for Quieting Titles; and they should be delivered at one time, not piece-meal. For the preliminary proceedings see the Act (29 Vic. c. 25,) secs. 1, 2, 3 & 4, page 147 *et seq.*, and Consolidated Orders 492 to 499, page 171.

1. The affidavit of the petitioner under the 6th section of the Act. (For form see page 179.) The affidavit should also state whether the petitioner is married or not.

2. The certificate of his counsel or solicitor, under the 8th section of the Act.

3. The County Registrar's certificate of the state of the title up to the time of registering a certificate of the petition being filed.

4. All deeds and evidences of title in the petitioner's possession or power. See Act, sec. 5, sub. sec. 1, page 150.

5. If the petitioner cannot produce all the deeds relating to the land, under which he derives title, he must procure and produce :—

(a) Certified copies of the memorials (with affidavits of execution) of all *other* registered instruments affecting the title.

(b) Affidavits of diligent search for the originals of all deeds to which these memorials relate, and of all other deeds relating to the title which are not produced.

(c) Proof of contents of the non-produced deeds. Those of which there are memorials in the short form in use before the late Registry Act should be shown to have contained no trust, limitation, condition, exception or qualification not mentioned in the memorial.

6. If any of the deeds have no receipt for the consideration endorsed, there must be produced some proof of payment of the consideration.

7. If there is no release of dower by the wife of a former owner, show that he was unmarried when he conveyed, or that his wife is dead; otherwise the certificate of title must be subject to her dower.

8. Affidavits are required showing that possession has always accompanied the title under which the petitioner claims. (See Consolidated Order 501, page 172.) Also affidavits showing who is now in occupation, and under what title or claim of title.

9. Sheriff's certificate that the property is not affected by any execution, sale under execution, or tax sale. See page 36.

19. Treasurer's certificate that there are no taxes in arrear and that there has been no sale for taxes. See page 37.

11. Collector's receipt for any taxes that are not shown by the Treasurer's certificate to have been paid.

12. Certificate or affidavit that there are no Crown debts affecting the property. See Con. Stat. U. C. c. 5; 29 & 30 Vic. c. 43, and page 34.

13. A concise statement of any other facts necessary to make out the title; and affidavits or other evidence to prove the same.

14. Schedule of the particulars so produced.

AFFIDAVIT OF PETITIONER.

IN CHANCERY.

In the matter of

I of the petitioner in this matter make oath and say :—

1. I am the absolute owner in fee simple in possession (*or as the case may be, repeating the words of the petition*) of the following lands (*describing the property*) being the lands mentioned in the petition in this matter.

* 2. There is no charge or other incumbrance affecting my title to the said land (*except, stating any incumbrances which may exist.*)

3. I am not aware of the existence of any claim adverse to or inconsistent with my own to any part of the land claimed by me or to any interest therein, (*except, specify the adverse claim, if any, giving the name and address of the claimant if known, and stating how the claim arises.*)

4. The deeds and evidences of title which I produce in support of my petition in this matter, and of which a list is set out in the schedule of particulars produced by me in support thereof and marked as exhibit A, are all the title deeds and evidences of title relating to the said land which are in my possession or power.

5. The title deeds and evidences of title relating to the said land which are set out or mentioned in the schedule hereto marked as exhibit B, are in the possession or power of (*naming the person.*)

6. I do not know where, or in whose possession or power the title deeds and evidences of title set out or mentioned in the schedule marked as exhibit D are. For the said last mentioned title deeds I have caused the following searches to be made (*set out the facts showing the searches which have been made for the missing deeds and upon which it is intended to rely as sufficient to let in secondary evidence.*)

7. I am (*or A. B. is, show under what claim or title*) in possession of the said land, and to the best of my

knowledge and belief possession has always accompanied the title under which I claim, since the year when one through whom I claim took possession, and prior thereto the land was in a state of nature, (*if possession has not always accompanied the title under which the petitioner claims, state correctly the facts as to the actual possession.*)

8. To the best of my knowledge, information and belief this affidavit and the other papers produced herewith in support of my petition, and which are set forth in the said schedule of particulars fully and fairly disclose all facts material to my title, and all contracts and dealings which affect the same or any part thereof or give any right as against me.

9. There are no arrears of taxes due upon the said land, nor has the said land been sold for taxes during the past year, nor under execution during the past six months, and I do not know of any writs of execution in the hands of the Sheriff against me, or affecting the said lands.

10. I am not aware of any insurance effected with any Mutual Insurance Company by any former owner of or any person interested in the said lands or any buildings thereon, nor do I believe there was any such, and I have not myself effected any such insurance *except, stating any insurance which may have been effected.*)

11. To the best of my knowledge, information and belief, no person or body corporate has any right of way, or of entry, or of damming back water, or of overflowing or of placing or maintaining any erection, or of preventing the placing or maintaining of any erection on, in, to or over the said lands other than myself (*except, giving the names and addresses of any parties having any easement or right, and stating the particulars and nature thereof,*) and the said land is not subject to any easement or dominant right whatever, (*except as aforesaid.*)

12. I am married, and the name of my wife is
(or, I am not married.)

CERTIFICATE OF COUNSEL.

IN CHANCERY.

In the matter of

I of (Barrister, or Attorney
at law,) hereby certify that as (counsel or solicitor) for
the petitioner in this matter, I have investigated his title
set forth in his petition, and believe him to be the owner
of the estate which he claims in the petition (*subject only
to the charges and incumbrances therein set forth.*)

I further certify that I have conferred with the peti-
tioner on the subject of the various matters set forth in
his affidavit in support of his petition, and believe the
same to be true.

A. B.

SHERIFF'S CERTIFICATE.

Sheriff's office, County of
day of

18

I hereby certify that I have not at the date hereof in
my office any writs of execution against the lands of
(*or any or either of them*) and that I have not
had any such writs for thirty days preceding the date
hereof.

I further certify that I have not sold lot in the
concession of the township of under any writ
of execution for six months preceding the date hereof.

F. W. J.

Sheriff.

CERTIFICATE AS TO TAXES.

Treasurer's office, County of _____
day of _____ 18__

I certify that no charge for arrears of taxes appears at the date hereof in the books of this office against Lot No. _____ in the concession of the Township of _____. I further certify that the return of lands in the Township of _____ in arrear for taxes for the year 18__ has been made to this office.

And I further certify that the said land has not been sold for taxes for eighteen months preceding the date hereof.

S. T.
Treasurer.

AFFIDAVIT AS TO CROWN DEBTS.

IN CHANCERY.

In the matter of _____

I, _____ of _____ make oath and say :—

I have carefully searched the register in the office of the Clerk of the Court of Queen's Bench at Toronto, and I say that there has not been registered therein, any deed bond, contract or other instrument whereby any debt, obligation or duty, was incurred or created to Her Majesty on the part of (*naming the petitioner and all persons who before the 29 & 30 Vic. c. 43, had any estate in the lands in question*), or (*save and except the several bonds and instruments hereinafter mentioned that is to say, setting out any bonds*).

Sworn, &c.

ADVERTISEMENT.

IN CHANCERY.

In the matter of _____

Notice is hereby given that A. B., &c., has made an application to the Court of Chancery for a certificate of title to the above mentioned property under "the Act for Quieting Titles to Real Estate in Upper Canada," and has produced evidence whereby he appears to be the owner thereof in fee, free from all incumbrances (*except, stating the incumbrances if any*); wherefore any other person having or pretending to have any title to or interest in the said land or any part thereof is required on or before day the day of now next ensuing, to file a statement of his claim in my Office at Osgoode Hall, in the City of Toronto, and to serve a copy on the said A. B. or on J. H., of the City of Toronto, his solicitor, and in default every such claim will be barred and the title of the said A. B. become absolute and indefeasible at Law and in Equity, subject only to the reservations mentioned in the 17th section of the said Act and therein numbered one, two, three and four.

Dated this day of 18

X. Y.,

Referee of Titles.

NOTICE UNDER THE 14TH SECTION OF THE QUIETING TITLES ACT.

IN CHANCERY.

In the matter of

Take notice that A. B., of, &c., has made an application to the Court of Chancery for a certificate of his Title to the above mentioned property, under "The Act for Quieting Titles to Real Estate in Upper Canada;" and take notice that if you claim any interest therein you must lodge your claim in writing, stating the particulars thereof at my Chambers in

on or before the day of and serve a copy on the said A. B. or on J. H. of, &c., his solicitor, and in default thereof any claim, right, or interest, you may have therein at Law or in Equity will be for ever barred and extinguished.

Given under my hand this day of 18

X. Y.,

Referee of Titles.

AFFIDAVIT OF PUBLICATION OF ADVERTISE- MENT.

IN CHANCERY.

In the matter of

I. A. B. of, &c., make oath and say :

1. A true copy of the advertisement now produced and shewn to me and marked as exhibit A, appeared and was published in the issue of the Ontario Gazette on the day of .

2. A true copy of the said advertisement also appeared and was published in each issue of the news-
paper on the and days of .

3. I have examined copies of the said Gazette and newspaper issued on each of the said days.

Sworn, &c.

AFFIDAVIT OF POSTING UP THE ADVERTISE- MENT IN THE COURT HOUSE.

IN CHANCERY.

In the matter of

I. A. B. of, &c., make oath and say :

1. That I did on the day of post up and affix in a conspicuous place in the Court House in the town of a true copy of the advertisement in this matter now produced and shewn to me and marked as exhibit A to this affidavit.

2. That the said advertisement so posted up by me as aforesaid remained affixed up in the said place for the full period of one month.

3. The said Court House is the Court House of the County in which the lands in question in this matter are situated.

Sworn, &c.

AFFIDAVIT OF POSTING UP ADVERTISEMENT AT THE NEAREST POST OFFICE.

IN CHANCERY.

In the matter of

I. A. B. of, &c., make oath and say:

1. I did on the day of post up in a conspicuous place in the post office in the Village of a true copy of the advertisement in this matter now produced and shewn to me and marked as Exhibit A.

2. The said advertisement remained where it was posted up by me continuously for the full period of one month.

3. The post office in the Village of is the post office nearest the lands in question in this matter.

Sworn, &c.

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